

No. 12574

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United States  
Court of Appeals  
for the Ninth Circuit.

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THE INDEMNITY MARINE ASSURANCE  
COMPANY, LIMITED,

Appellant,

vs.

FULGENCIA D. CADIENTE,

Appellee.

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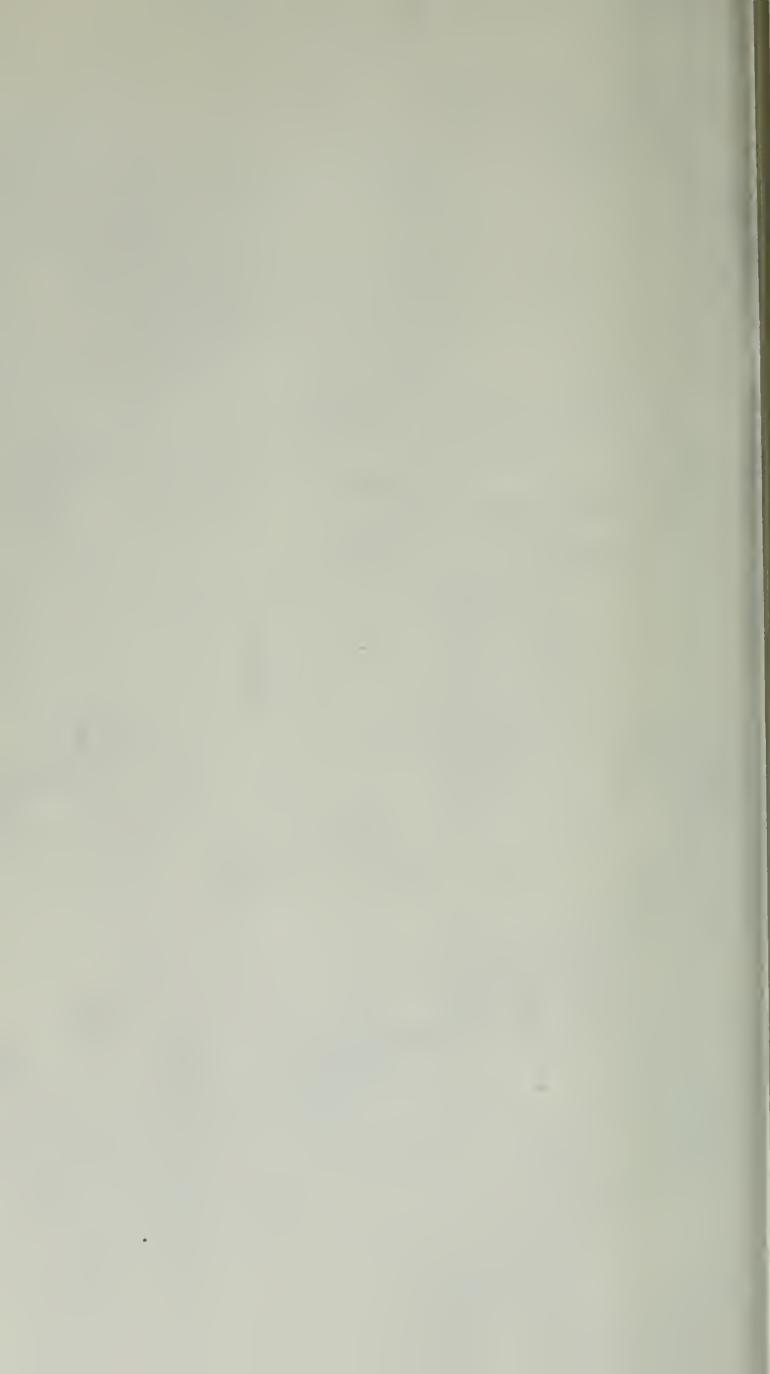
Apostles on Appeal

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Appeal from the United States District Court,  
District of Hawaii.

FILED  
AUG 19 1950

PAUL P. O'BRIEN,  
CLERK



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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

HYMAN M. GREENSTEIN, ESQ.,

501 Merchandise Mart Building,  
Honolulu, T. H.

For the Libelant, Fulgencia D. Cadiente.

ROBERTSON, CASTLE & ANTHONY,

THOMAS M. WADDOUPS, ESQ.,

ROBERT E. BROWN, ESQ.,

312 Castle & Cooke Building,  
Honolulu, T. H.

For the Respondent, The Indemnity Ma-  
rine Assurance Company, Limited.

In the United States District Court for the  
Territory of Hawaii

Admiralty No. 417  
Suit on Maritime Insurance Policy

FULGENCIA D. CADIENTE,

Libelant,

vs.

THE INDEMNITY MARINE ASSURANCE  
COMPANY LIMITED,

Respondent.

LIBEL IN PERSONAM

To The Honorable, the Judges of the United States  
District Court for the Territory of Hawaii:

Comes now Fulgencia D. Cadiente, libelant above named, by Hyman M. Greenstein, her proctor, and for libel against The Indemnity Marine Assurance Company, Limited, respondent above named, respectfully represents as follows:

1. That libelant at all times hereinafter mentioned was and now is a citizen of the United States of America, residing in Honolulu, City and County of Honolulu, Territory of Hawaii.

2. That libelant is informed and believes and upon such information and belief states the fact to be that respondent is a foreign corporation, having its principal place of business in England, and doing business in the Territory of Hawaii through

The Bonding and Insurance Agency, Ltd., an Hawaiian corporation, as its duly authorized agent.

3. That on or about the 8th day of December, 1948, by a marine insurance policy, number 11 S.F.H. 10562, in consideration of an agreed premium, which has been duly paid by the libelant, said respondent insured the libelant in the sum of \$10,-500.00, covering total loss or constructive total loss of a certain oil screw vessel, Miss Philippine, owned by said assured libelant; a copy of said marine insurance policy is made a part of this libel and marked Exhibit "A."

4. That on or about the 6th day of June, 1949, said vessel Miss Philippine, did become stranded or run aground on the beach at Kaupo, Hana, Maui, Territory of Hawaii, and the bottom thereof did become torn loose, so that said vessel did become a constructive total loss within the meaning and coverage of said marine insurance policy.

5. That libelant has duly complied with and duly performed all the conditions of the marine policy issued as aforesaid, on her part to be performed, and duly advised the duly authorized agents of respondent insurance company of said loss.

6. That libelant is still the owner of said insurance policy, and is entitled to receive the loss payable thereunder.

7. That no part of said \$10,500 has been paid although demanded by libelant, and by reason of

the premises there is now due and owing from respondent to libelant the said sum of \$10,500.00, with interest thereon from June 6, 1949.

8. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that citation or monition in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the respondent herein, citing it to appear and answer the premises, and that a decree may be entered herein in favor of libelant against the respondent for the amount claimed, together with interest thereon, and proctor's fees, and costs and disbursements herein, and that the court may grant to libelant such other and further relief as the justice of the cause may require.

Dated at Honolulu, T. H., this 6th day of July, 1949.

/s/ HYMAN M. GREENSTEIN,  
Proctor for Libelant.

Territory of Hawaii,  
City and County of Honolulu—ss.

Fulgencia D. Cadiente, being first duly sworn on oath deposes and says: That she is the libelant above named, that she has read the foregoing Libel, knows the contents thereof and that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters she believes it to be true.

/s/ FULGENCIA D. CADIENTE.

Subscribed and sworn to before me this 6th day of July, 1949.

[Seal] /s/ RON I. PAVAO,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires January 22, 1951.



6

# The Indemnity Marine Assurance Company Limited

ESTABLISHED 1824

HEAD OFFICES: LLOYD'S BUILDING, LONDON E.C.3, ENG.

WM. H. MCGEE & CO., INC.  
UNITED STATES MANAGERS

111 JOHN STREET, NEW YORK 7, N. Y.

PACIFIC COAST DEPARTMENT  
300 CALIFORNIA STREET, SAN FRANCISCO 4, CAL.

AMOUNT \$ 10,500.00 RATE 3% PREMIUM \$ 315.00  
(as hereinafter provided)

In consideration of the stipulations, terms and conditions herein named

-----THREE HUNDRED FIFTEEN AND NO/100-----Dollars, Premium

Insurance on FULGENCIA D. CADIENTE

Address is General Delivery, Ewa, Oahu, T. H.

on the 8th day of December 1948 at noon, to the 8th day of December 1949, at noon,

and Time at place of issuance, unless sooner terminated as hereinafter provided.

Payable to BANK OF HAWAII with balance, if any, payable to JOICHI TAMIMURA of KEWALO SHIPYARDS

In the event of non-payment of premium thirty days after attachment this Policy may be cancelled by the Assured upon five days' written notice being given the Assured.

This Policy is made and accepted subject to the foregoing stipulations, terms and conditions, and to the stipulations, terms and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with all other provisions, agreements, or conditions as may be endorsed hereon or added hereto on page three of this Policy; and no officer, agent, or other representative of this Company shall have power to waive or be deemed to have waived any provisions, terms, conditions or stipulations of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

Provisions required by law to be stated in this Policy:—This Policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by Wm. H. McGee & Co., Inc., or a duly authorized agent of this Company.

Wm. H. McGEE & CO., Inc., United States Managers

*H. Jackson*  
PRESIDENT

and countersigned at Honolulu, T. H. this 8th day of December, 1948

THE BONDING AND INSURANCE AGENCY, LTD.

*[Signature]*  
Agent





## CONDITIONS REFERRED TO ON THE FACE OF THIS POLICY

TOUCHING the adventures and perils which said Company is contented to bear and take upon itself, they are of the seas, fires, assailing thieves, jettisons, criminal barratry of the master and mariners and all other like perils and disasters that have or shall come to the property hereby insured or any part thereof, and in case of loss or misfortune, it shall be lawful and necessary to and for the Assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property hereby insured or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or Insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said Company will contribute in proportion as the sum thereby insured bears to the whole sum at risk.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detention, or the consequences thereof or of any attempt thereof, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

This insurance is warranted free of loss or damage caused by or resulting from strikes, lockouts, labor disturbances, riots, civil commotions or the acts of any person or persons taking part in any such occurrence or disorder.

No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the term covered by this Policy.

If there be an Agent or Surveyor of the Insurers located at or near any place where repairs are made, or proofs of loss or average taken, said Agent or Surveyor must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by the said Assurers.

Warranted that no action will be taken by the Assured or his assignees to enforce payment of any claim under this Policy except before the tribunals of the United States of America or England.

Notwithstanding any language, whether written, typewritten or printed, contained in this Policy to the effect that it is for the benefit of whom it may concern, or any similar language, it is agreed that if the Assured's interest in the vessel hereby insured shall change during the currency of this Policy, then this Policy shall become null and void from the date of such change of interest, unless such change shall have been assented to in writing by these Insurers.

It is a condition of this insurance that any broker, person, firm or corporation who shall procure this insurance to be taken by these Insurers shall be deemed to be exclusively the Agent of the Assured in any and all transactions and representations relating to this insurance, and that any notice which these Insurers may give to such broker shall be deemed to have been given to the Assured, who hereby appoints said broker, his, its or their agent for that purpose and the other purposes aforesaid.

W. H. M. GEE & CO.  
LONDON



# AMERICAN HULLS (Pacific)

T. and C. T. L. only

Touching the Adventures and Perils which we, the said Assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and detentions of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessels, &c., or any part thereof. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants, and Assigns, to sue, labour and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance. And it is expressly declared and agreed that no act of the Assurers or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Warranted free of all average (whether particular or general) salvage charges and particular charges, this insurance being against the risk of Total and/or Constructive Total Loss of vessel only arising from perils insured against.

In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and where-soever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed, and to go on trial tripa.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices.

Should the vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium, to her port of destination.

In ascertaining whether the Vessel is a constructive total loss, the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Should the vessel be sold or transferred to new management, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale or change of management shall apply even in the case of insurance "for account of whom it may concern".

This insurance also specially to cover total or constructive total loss of vessel directly caused by the following:—

- Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel. Explosions on shipboard or elsewhere.
- Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part).

Negligence of Master, Mariners, Engineers or Pilots, provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

In the event of total or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

At the expiration of this Policy to return.....11.....per cent. net for every thirty consecutive days the Vessel may be laid up in port out of commission, and to return.....20 1/2.....per cent, net for every thirty days of unexpired time if it be mutually agreed to cancel this Policy, but no returns whatsoever to be paid in case of loss of the Vessel.

In the event of the Vessel being laid up in port for a period of 30 consecutive days a part only of which attaches to this Policy is hereby agreed that the laying up period in which either the commencing or ending date of this Policy falls shall be deemed to run from the first day on which the Vessel is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching hereto bear to thirty.

Notwithstanding the foregoing this Policy is:

- (a) Warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detention, or the consequences thereof or of any attempt thereof, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

- (b) Warranted to be subject to English law and usage as to liability for and settlement of any and all claims.

Three



Wm. H. McGee & Co., Inc.  
General Agents  
111 John Street  
New York 7, N. Y.

December 8th, 1948.

### ADDENDUM

For attachment to Policy No. 11 SFH 10562  
of the Indemnity Marine Assurance Company  
issued to Fulgencia D. Cadiente

Notwithstanding anything herein contained to the contrary, it is mutually understood and agreed that in ascertaining whether the vessel is a Constructive Total Loss, \$21,000.00, shall be taken as the repaired value and nothing in respect to the damaged or breakup value of the vessel or wreck shall be taken into account. Should the assured by reason of insured perils become entitled to abandon the vessel and to claim a Constructive Total Loss but refrain from doing so and the vessel be not repaired or if she be sold unrepaired, liability hereunder shall be determined as if notice of abandonment had been given and a Constructive Total Loss claimed.

All Other Terms and Conditions Remain Unchanged.

[Endorsed]: Filed July 6, 1949.

[Title of District Court and Cause.]

### MONITION

The President of the United States of America

To the Marshal of the United States of America  
for the Territory of Hawaii—Greetings:

Whereas, a Libel has been filed in the District Court of the United States for the Territory of Hawaii, on the 6th day of July, 1949, by Fulgencia D. Cadiente, Libelant, against The Indemnity Marine Assurance Company, Limited, Respondent, in a certain action for loss under an insurance policy, civil and maritime, to recover the sum of \$10,500.00, (as by said Libel, reference being hereby made thereto, will more fully appear) therein alleged to be due the Libelant and praying that a citation or monition may issue against the said respondent pursuant to the rules and practices of this Court.

Now, Therefore, we do hereby empower and strictly charge and command you, the Marshal, that you cite and admonish the said Respondent if it shall be found in your District, that it be and appear and answer before the said United States District Court 20 days after service hereof on the Respondent, then and there to answer the said Libel and to make allegations in that behalf. And have you then and there this writ with your return thereon.

Witness, the Hon. J. Frank McLaughlin, Judge

of said Court, at the City and County of Honolulu, in the Territory of Hawaii, this 6th day of July, A.D. 1949, and of our Independence the one hundred and seventy-fourth.

[Seal]     /s/ WM. F. THOMPSON, JR.,  
                  Clerk.

          /s/ HYMAN M. GREENSTEIN,  
                  Proctor.

[Endorsed]: Filed July 6, 1949.

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[Title of District Court and Cause.]

### ANSWER

Comes now The Indemnity Marine Assurance Company, Limited, respondent above named, by Robertson, Castle & Anthony, its proctors, and answering the libel filed in the above-entitled cause respectfully alleges as follows:

#### I.

That it neither admits nor denies the allegations of paragraph 1 thereof, but leaves libelant to her proof thereof.

#### II.

That it admits the allegations of paragraph 2 thereof.

## III.

That it admits the issuance of a policy of marine insurance as alleged in paragraph 3 thereof, but denies that said policy contains any mention of the vessel *Miss Philippine*.

## IV.

That it denies the allegations of paragraph 4 thereof.

## V.

That it denies the allegations of paragraph 5 thereof.

## VI.

That it neither admits nor denies that libelant is the owner of said policy of marine insurance but leaves libelant to her proof thereof, and that it denies that there is any loss payable under said policy.

## VII.

That it admits that no part of \$10,500 has been paid but denies the other allegations of paragraph 7 thereof.

Wherefore, respondent prays that the libel herein be dismissed and judgment rendered in favor of respondent for its costs, disbursements and proctors' fees herein.

Dated: Honolulu, Hawaii, November 3, 1949.



The Indemnity Marine Assurance Company, Limited, respondent,

By ROBERTSON CASTLE &  
ANTHONY,  
Its Proctors.

By /s/ ROBERT E. BROWN.

Duly verified.

Receipt of Copy Acknowledged.

[Endorsed]: Filed November 3, 1949.

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[Title of District Court and Cause.]

FINDINGS AS GLEANED AND  
CONSTRUED FROM EVIDENCE

Libelant was the owner of an oil screw vessel named "Miss Philippine," an exaggerated type of sampan, built and registered at Honolulu, Hawaii, in 1947. The vessel was adapted for and used by the owner, with other vessels, in off-shore fishing. Agents or representatives of the respondent came to libelant's home and solicited the writing of insurance on said vessel, and on December 8, 1948, an insurance policy was written by respondent in favor of libelant-owner to cover for a year, a total or constructive total loss in the payable sum of \$10,500. Prior to December, 1948, another insur-

ance agent's company had carried a more comprehensive policy for a year at a higher rate, 8%, but had not notified libelant of its expiry or solicited its renewal. The payee of the present policy, in event of loss, was Bank of Hawaii, a party in interest as mortgagee at the time, and the policy was delivered by respondent directly to the bank. Neither the libelant or Telesforo Cadiente, her husband, agent and business manager, ever saw the policy or the addendum rider clipped thereto, which rider requires "that in ascertaining whether the vessel is a constructive total loss \$21,000 shall be taken as the repaired value." It was in no manner explained to either of them in any of its terms and they were given no opportunity to read it, being told only that the policy covered total and constructive total loss in the sum of \$10,500. The premium of \$315 was paid.

On Monday, June 6, 1949, said vessel was stranded by reason of the displacement and loss of her propeller and rudder and, dragging her anchor, she was driven by the sea onto a boulder-strewn, isolated beach at Kaupo, Island of Maui, Hawaii, so that she lay athwart or transverse to the sea and was being pounded and heavily rocked by a fairly high sea. As soon as her master could obtain a means of communication he notified the U. S. Coast Guard on that island who in turn communicated information of the stranding to the husband and managing agent of the owner at Ewa, Oahu. Apparently, this information was communicated the

same day to the respondent and to King, Limited, a tugboat operator at Honolulu. A Coast Guard craft went to the scene and from the sea looked the situation over and reported to the master that they could do nothing toward an attempt to draw the vessel off the rocky beach as the sea was running too high.

The owner's agent, Telesforo Cadiente, went to Maui the following day by plane and by automobile reached the beach where the vessel was stranded. He and the master of the stranded vessel made what inspection and examination they could from the shore and saw she was rocking heavily between large boulders and that part of her hull was stove and the sea was surging through her. They could not board her as the sea was running high and throwing water over her.

Before leaving Honolulu, Cadiente was approached by Charles P. Hagood, master of King, Limited's, tugboat "Maizie C," who told him he would like to go to Maui and look at the stranded vessel, and asked libelant's agent to pay his passage for that purpose as he believed he could get the vessel off the rocks and bring her to Honolulu. Cadiente paid Hagood's transportation and, after arriving at Maui, Hagood chartered a small airplane and was flown to the site of the vessel and circled over and around it several times at low altitude. Upon landing he told Cadiente that he believed he could get the vessel into the sea and tow her to Honolulu. A tentative oral agreement was made that he proceed.

The following morning, Wednesday, June 8, Cadiente and the vessel's master and crew again visited the vessel. On this occasion they were able to get on board and make a more intimate examination, although she was still being heavily rolled between the boulders and was much more damaged than the day before. A number of her ribs were broken and some carried away on the port side, amidship and aft; her keel was badly battered and damaged with parts carried away; water was surging through the engine room; and she was firmly wedged between boulders, being broken more with each heavy sea that struck her.

Cadiente and the vessel's master came to the conclusion as a result of this inspection that it would be a hopeless and unjustifiable risk to undertake salvage and rebuilding of the vessel and Cadiente decided then and there to abandon her as a total loss, and told the crew to return to Honolulu. He telephoned to Captain Hagood not to come to Maui with his tug, the "Maizie C", to undertake salvage operations and told the Coast Guard office as well that he was abandoning the vessel and to tell Hagood and the Insurance Company. He then returned to Honolulu and again told Hagood not to take the "Maizie C" to Maui, that he had abandoned the boat.

The morning of June 9, he went to get advice as to the feasibility of rebuilding the boat from J. Tanimura, the proprietor of Kewalo Shipyard, who had built the boat in 1947, and after discussing with

Tanimura the position and condition of the vessel and getting the advice of the builder he was confirmed in his judgment and decision of abandoning her as an irredeemable total loss.

That evening at 8:00 p.m. he received a letter dated June 9, signed by Mr. A. H. Matthew, office manager of the agents of respondent, advising him that the sampan "Miss Philippine" was stranded at or near Pauhana, Maui, and that he "proceed with salvaging of this vessel in accordance with conditions of the above policy."

The morning of Friday, June 10, he called on Mr. Matthew at his office and told him that he had talked with the builders and the Coast Guard and had reached a definite decision that it would be an unwarranted risk and useless for him to undertake to salvage and rebuild the boat, and he had abandoned her and had, before leaving Maui on the 8th, asked the Coast Guard to so advise the agents of the insurance company of such surrender.

At Mr. Matthew's request he went the same day to the office of the insurance agents' attorney, Thomas Waddoups. There he was asked if he was abandoning the sampan and he said, "Yes," he had abandoned it. Then Mr. Waddoups told him to get a lawyer and he was told to come back on Monday, the 13th, and bring his wife. He attended the Monday meeting. A number of persons were then present at Mr. Waddoups' office and he learned that the insurance company had two days prior entered into a charter party with King, Limited, to send

the tug "Maizie C" to Maui to undertake salvage operations under control of a Mr. Gallagher, a ship surveyor, as agent for the respondent. The following day libelant's attorney wrote respondent demanding \$10,500 for total loss under the policy.

The charter party above mentioned was put in evidence as libelant's Exhibit "B." It provided that an attempt be made to float the sampan and tow her to a Marine Railway at Honolulu, the owners of "Maizie C," an oil screw motorboat, to be paid \$15 per hour for hire with three regular crew and \$1.00 per hour for three additional crew, also \$100 for additional insurance protection, and any and all other expenses incurred by her owner, or agents, which were reasonably necessary to the undertaking; provided, on express agreement, that if salvage operations were not successful at the time charges amounted to the sum of \$1,500, including charges for the tug's return to Honolulu, the salvage operations were to be abandoned and the "Maizie C" was to return forthwith to Honolulu, unless the Charterer or its agent on the spot authorized a continuance of said operations in writing; and if "Miss Philippine" was damaged or lost during the salvage operations the Charterer would be responsible therefor.

Salvage operations under the charter and otherwise were begun at Kaupo, Maui, on Saturday, June 11, under the directions of Mr. Gallagher. The sea had quieted down considerably, although the beach is always exposed to channel currents. Several

large-sized air bags were brought ashore from the "Maizie C," together with a small air compressor for inflating them. The bags were secured under deck and inflated. Mr. Gallagher procured the services of a heavy-duty bulldozing machine and its operator and brought it to the beach. The bulldozer pushed and the "Maizie C" pulled; eventually, the boat was turned with prow toward the sea and was pushed and pulled several hundred feet until she had reached sufficient depth for the "Maizie C" to pull her into deep water. A photograph was exhibited to the Court showing the powerful bulldozer a considerable distance from the shore in what appeared to be a perilous position with spray flying over it, but apparently this picture was not put in as an Exhibit. Upon reaching deep water the vessel capsized, turning completely upside down. This resulted in a serious towing problem for the "Maizie C," a motorboat. Towing was begun, however, along the lee side of Maui and by nightfall of June 13 she had made, at a rate of about four miles per hour, 40 to 45 miles, to a point near Lahaina. From this point forward the tow would have to leave the lee of Maui and encounter rough seas, first in the Pailolo Channel running between Maui and Molokai, and then, if he tried to make Honolulu with his heavy tow, in the wider Kaiwi Channel between Molokai and Oahu. Hagood thought it would be very difficult and problematical of success to cross both channels. By this time the \$1,500 limitation fixed by the Charterer had become exhausted; he

radiophoned from his boat to his company telling his position and the situation. His company took the matter up with the respondent and received a statement from it that it had no further instructions beyond the terms of the Charter.

Upon learning this Captain Hagood considered himself in a serious predicament for he knew that if he cut the tow loose he would be liable for creating a derelict on the high seas. He said he was apprehensive that if he attempted to tow the wreck to Honolulu it might break up in the rough channel. He asked further instructions from his owner and was told to try to get the boat into a safe harbor, and tie her up, but to use his discretion. He could have taken her to Moala or other ports nearby on Maui, but he decided to try to make Kaunakakai on Molokai, where a friend of his named Yamamoto had a small boatbuilding business and where the wharf was equipped with two heavy cranes. He arrived there the next day, Tuesday, June 14, and tied the wreck to the wharf.

The same day Mr. Gallagher and C. G. Chipchase, an officer of respondent, flew from Honolulu to Kaunakakai and made arrangements with California Packing Corporation, which operates the wharf, to have the boat slung, lifted and warped to an upright position, and then returned to Honolulu. Before Captain Hagood left Kaunakakai he visited his friend Yamamoto and discussed the situation and, while the full scope of the conversation was not disclosed, the part disclosed strongly



indicated that he told Yamamoto he could have the boat if he moved it away from the wharf to his lot. In any event the vessel was taken to Yamamoto's inland yard at some later date. Captain Hagood testified that he would not have accepted the wreck as a gift, but that Yamamoto thought it had some salvage value to him. Upon lifting and turning the vessel over, further damage was done in crushing her sponsons, a protruding part of the hull, by compression of the slings.

On July 16, King Limited wrote to the attorney for the libelant saying they were in receipt of a letter from the Board of Harbor Commissioners directing them to remove the "Miss Philippine" from alongside the wharf at Kaunakakai and telling the attorney that if his client as well as the insurer claimed no further interest in the vessel it was the intention of King Limited to "cannibalize and destroy" the vessel. Apparently no reply was received from either party.

### Opinion and Conclusions

The respondent questions the right of the libelant to abandon the vessel on the beach at Kaupo, Maui, and his refusal to take her over at Kaunakakai, Molokai, but I believe his judgment in abandoning her on the beach was vindicated by every subsequent event, and that there certainly was no duty on libelant to seek her possession after respondent had abandoned her at sea.

When the insurer, thinking its judgment was

best, after notice of libelant's abandonment, took her into its control on June 11 and bulldozed her off the beach and then abandoned her carcass at sea two days later in an upturned position, she was a derelict at the mercy of the sea, save for the acts of King Limited, which then took her in a new charge with right of ownership as salvor and towed her remains to a harbor of its selection where she was tied fast to a wharf. The fact that the insurer's agents came in afterwards and had her righted, keel down, does not dispose of their abandonment of her at sea the day before, for this to my mind was a clear and constructive acceptance of libelant's abandonment and respondent's claim of right of disposition. On June 14, King Limited were dealing with the wreck as their problem and no showing was made that the insurer had the consent of King Limited to touch a hand to her at Kaunakakai.

The evidence of Mr. Gallagher that she might have been repaired for \$7,500 was in no manner convincing. The "human probabilities rule" as to the cost of getting her off the beach and her condition thereafter, and the cost of getting her into a marine railway at Honolulu and repairing her to good and staunch seaworthy condition, are not of value in the facts of this case, where "human probabilities" could be so highly colored by guesswork alone. The libelant's manager believed, in effect, that he would be putting good money after bad in experimenting further with such an uncertainty

and this view was confirmed after he discussed the matter with the boat's builder. I am convinced that he would have made the same decision if he had had no insurance policy. The respondent, which had \$10,500 at stake as to the question of a total loss, seems to have come to the same conclusion on June 13, that salvage was hopeless; for it was then responsible for the position of the wreck and, in response to request for instructions, gave it to the sea or to King Limited.

My conclusion is that the libelant was justified in abandoning the wreck and gave notice of such decision timely and that he was justified in refusing to have the wreck wished on him at a later date after abandonment at sea by the respondent. There is no question that an insurer may by its conduct make itself liable for a total loss and it is my opinion that the respondent is liable for payment of a constructive total loss.

Judgment will enter accordingly.

Dated at Honolulu, Hawaii, April 19, 1950.

/s/ D. E. METZGER,  
United States District Judge.

[Endorsed]: Filed April 19, 1950.

In the United States District Court for the  
Territory of Hawaii

Admiralty No. 417

Suit on Maritime Insurance Policy

FULGENCIA D. CADIENTE,

Libelant,

vs.

THE INDEMNITY MARINE ASSURANCE  
COMPANY, LIMITED,

Respondent.

### FINAL DECREE

This cause having heretofore duly come on to be heard upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties and the court, after due deliberation, having rendered its opinion in writing directing a decree of judgment, and libelant's costs having been taxed at the sum of \$56.33, now on motion of the proctor for the libelant, it is

Ordered, that the opinion of this court heretofore filed herein on the 19th day of April, 1950, be and is hereby adopted as the court's findings of fact and conclusions of law; It Is Further Ordered, Adjudged and Decreed, that Fulgencia D. Cadiente, libelant, recover of and from the Indemnity Marine Assurance Company, Limited, respondent, the sum of \$10,500.00 together with interest thereon

from the 6th day of June, 1949, together with the sum of \$56.33 costs of the libelant as taxed, amounting in all to a judgment of \$10,556.33 together with interest on said total sum until paid; and it is further

Ordered that unless this decree be satisfied or appeal taken therefrom within 10 days after service of a copy of this decree upon the respondent, or his proctor, the libelant have execution against the respondent and its stipulators for costs, their goods, chattels and lands forthwith to satisfy this decree.

Dated at Honolulu, T. H., this 25th day of April, 1950.

/s/ D. E. METZGER,  
United States District Judge.

Approved as to form with all rights of appeal expressly reserved.

/s/ THOMAS M. WADDOUPS,  
Proctor for Respondent.

Receipt of copy acknowledge.

[Endorsed]: Filed April 25, 1950.

[Title of District Court and Cause.]

## BILL OF COSTS

Proctor's docket fee (clerk's costs).....	\$15.90
U. S. Marshal's fee.....	4.18
Proctor's fee .....	20.00
Other disbursements:	
Notarial fee .....	.25
Witness fees .....	16.00
	<hr/>
	\$56.33

Dated at Honolulu, T. H., this 21st day of April, 1950.

/s/ HYMAN M. GREENSTEIN,  
Proctor for Libelant.

The within bill of costs is hereby consented to, reserving, however, all rights to appeal hereunder.

/s/ THOMAS M. WADDOUPS,  
Proctor for Respondent.

Approved and Allowed:

/s/ D. E. METZGER,  
United States District Judge.

[Endorsed]: Filed April 25, 1950.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable, the Above Entitled Court:

Comes now The Indemnity Marine Assurance Company, Limited, respondent in the above-entitled cause, and hereby claims an appeal to the United States Court of Appeals for the Ninth Circuit from the final decree of the above-entitled Court entered herein on the 25th day of April, 1950, and from each and every part of said decree and the findings, and conclusions and decisions of the above-entitled Court herein.

And respondent hereby gives notice of said appeal to Fulgencia D. Cadiente, libelant above named, and further notifies that respondent does not intend to make new pleadings or take new proofs on said appeal.

Dated: Honolulu, Hawaii, May 5, 1950.

THE INDEMNITY MARINE  
ASSURANCE COMPANY,  
LIMITED,

By ROBERTSON, CASTLE &  
ANTHONY,

By /s/ ROBERT E. BROWN,  
Its proctors.

## Order Allowing Appeal

The within petition for appeal is hereby allowed.

Dated: Honolulu, Hawaii, May 5, 1950.

/s/ D. E. METZGER,

United States District Judge.

[Endorsed]: Filed May 5, 1950.

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[Title of District Court and Cause.]

## BOND ON APPEAL

Know all men by these presents: That the Indemnity Marine Assurance Company, Limited, respondent above named, as principal, and United States Fidelity and Guaranty Company, a corporation duly authorized to do business in the Territory of Hawaii, as surety, are held and firmly bound unto the libelant above named in the sum of two hundred and fifty dollars (\$250.00) for the payment of which well and truly to be made, we bind ourselves and our successors and assigns, jointly and severally, and firmly by these presents.

The condition of this obligation is such that:

Whereas, the above bounden principal has taken its appeal to the United States Court of Appeals for the Ninth Circuit from the final decree entered by the United States District Court for the Dis-



trict of Hawaii in the above-entitled cause on the 25th day of April, 1950,

Now, therefore, if the said principal shall prosecute its appeal with effect and pay all costs if it fails to sustain said appeal, then this obligation shall be void; otherwise the same shall remain in full force and effect.

In witness whereof the said principal and surety have caused this instrument to be executed this 4th day of May, 1950.

THE INDEMNITY MARINE  
ASSURANCE COMPANY,  
LIMITED,

By its general agent  
THE BONDING AND INSURANCE AGENCY, LIMITED,

[Seal] By /s/ HERMAN LOUIS,  
Its President.

Principal.

UNITED STATES FIDELITY  
AND GUARANTEE COMPANY,

[Seal] By /s/ JOHN F. HRON,  
Its Attorney-in-Fact.

Surety.

Duly verified.

[Endorsed]: Filed May 5, 1950.

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Libelant above named:

To Hyman M. Greenstein, 501 Merchandise Mart Building, Honolulu, Hawaii, Proctor for Libelant:

Whereas the respondent herein, The Indemnity Marine Assurance Company, Limited, has lately appealed to the United States Court of Appeals for the Ninth Circuit from the entry of a final decree in favor of the libelant and against the respondent, which final decree was entered in the District Court of the United States for the District of Hawaii on April 25, 1950;

You are therefore cited to appear before the United States Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, forty days after the date of this citation to do and receive what may appertain to justice to be done in the premises.

Given unto my hand in Honolulu, City and County of Honolulu, Territory of Hawaii, on the 5th day of May, 1950.

/s/ D. E. METZGER,  
United States District Judge.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

### ASSIGNMENTS OF ERRORS

Comes now the respondent-appellant, The Indemnity Marine Assurance Company, Limited, and hereby assigns as error in the proceedings, orders, findings, conclusions, decision and decree of the above District Court in the above entitled cause, the following:

1.

That the District Court erred in rendering and entering its "Findings As Gleaned and Construed from Evidence" dated April 19, 1950, embodying its findings of fact, conclusions of law and opinion herein.

2.

That the District Court erred in rendering and entering its final decree herein dated April 25, 1950.

3.

That the District Court erred in failing to find and hold that respondent had issued to libellant a more comprehensive policy of marine insurance at a higher rate than the policy sued upon and covering the year December 8, 1948 to December 8, 1949, and that libellant had procured said comprehensive policy to be cancelled and the policy sued upon to be issued by respondent covering total and constructive total loss only at a cheaper rate.

## 4.

That the District Court erred in finding and holding that neither libellant nor her husband ever saw the policy sued upon or addendum thereto issued by respondent and that they were given no opportunity to read the same.

## 5.

That the District Court erred in finding and holding that on Wednesday, June 8, 1949, the vessel's keel was badly battered and damaged with parts thereof carried away.

## 6.

That the District Court erred in finding and holding that libellant decided on June 8, 1949, to abandon the vessel as a total loss.

## 7.

That the District Court erred in finding and holding that libellant on June 8, 1949, telephoned Captain Hagood not to come to the vessel with his tug to undertake salvage operations.

## 8.

That the District Court erred in finding and holding that libellant on June 8, 1949, told the Coast Guard he was abandoning the vessel and to tell respondent such notice.

9.

That the District Court erred in finding and holding that libellant on June 9, 1949, told Captain Hagood he had abandoned the vessel.

10.

That the District Court erred in finding and holding that libellant on June 9, 1949, after discussing with the vessel's builder the position and condition of the vessel and getting his advice, was confirmed in his judgment and decision to abandon the vessel as an irredeemable total loss.

11.

That the District Court erred in finding and holding that the libellant on June 10, 1949, told respondent he had talked with the vessel's builder and the Coast Guard; that he had reached the decision it would be unwarranted risk and useless to undertake salvage and rebuild the vessel; that he had abandoned the vessel; and that he had, before leaving Maui on June 8, 1949, asked the Coast Guard to advise respondent of such surrender of the vessel.

12.

That the District Court erred in finding and holding that libellant on June 10, 1949, told libellant's attorney that he was abandoning the vessel.

## 13.

That the District Court erred in finding and holding that on June 10, 1949, respondent's attorney told libellant's husband to come back and bring his wife on June 13, 1949.

## 14.

That the District Court erred in failing to find and hold that libellant first discussed the stranding of the vessel with respondent and with respondent's attorney on June 13, 1949.

## 15.

That the District Court erred in failing to find and hold that the letter written by libellant's attorney dated June 14, 1949, to respondent advised that the vessel had suffered total loss and notified respondent that libellant had abandoned the vessel and in failing to find and hold that said letter when received by respondent was the first notification to respondent of abandonment of the vessel by libellant.

## 16.

That the District Court erred in finding the holding that Captain Hagood upon tying the vessel to Kaunakakai wharf on June 14, 1949, and before leaving Kaunakakai told one Yamamoto that he could have the vessel if he moved it away from the wharf.

17.

That the District Court erred in failing to find and hold that testimony by Captain Hagood that he would not have accepted the wreck as a gift had reference to his inspection of the vessel in September 1949 after the vessel had been removed from the water, stripped and dismantled.

18.

That the District Court erred in failing to find and hold that crushing of the vessel's sponsons was caused by the actions of third parties in removing the vessel from water to shore and in finding and holding that such damage was done by respondent in righting the vessel in the water.

19.

That the District Court erred in finding and holding that neither respondent nor libellant replied to letter of King, Limited, dated July 16, 1949, stating the intention of that corporation to cannibalize and destroy the vessel and in failing to find and hold the respondent, libellant and King, Limited, each denied to the Board of Harbor Commissioners that it held any interest in the vessel.

20.

That the District Court erred in finding and holding that respondent in this suit questioned the right of libellant to refuse to take over the vessel at

Kaunakakai and in concluding and deciding that libellant was justified in refusing to take possession and control of the vessel at Kaunakakai.

## 21.

That the District Court erred in finding and holding that respondent undertook to salvage the vessel after receiving notice of libellant's abandonment thereof and in failing to find and hold that all efforts of respondent to protect and salvage the vessel were both undertaken and completed prior to receipt by respondent of any notice given by libellant of abandonment of the vessel.

## 22.

That the District Court erred in finding and holding that respondent abandoned the vessel at sea and in concluding and deciding that by such "abandonment" respondent indicated its belief that vessel could not be salvaged or was not worth further expenditure for salvage and that such "abandonment" constituted a constructive acceptance by respondent of libellant's abandonment of the vessel.

## 23.

That the District Court erred in concluding and deciding that on June 14, 1949, King, Limited, had the exclusive right to possession and control of the vessel and that respondent had no right to undertake further efforts on that date to protect and salvage the vessel.



24.

That the District Court erred in failing to conclude and decide that the vessel in her stranded position was not an actual total loss, was not in imminent peril of destruction and in all human probability could have then been recovered and repaired at a cost not exceeding \$21,000.

25.

That the District Court erred in failing to conclude and decide that the vessel in her righted position at Kaunakakai wharf on June 14, 1949 was not an actual total loss, was not in imminent peril of destruction and could in all human probability have then been recovered and repaired at a cost not exceeding \$21,000 and that the vessel could then have been recovered and repaired at a cost of approximately \$7,500.

26.

That the District Court erred in failing to conclude and decide that under the policy of marine insurance sued upon no recovery could be had for constructive total loss of the vessel unless the expense of recovering and repairing the vessel exceeded \$21,000.

27.

That the District Court erred in concluding and deciding that libellant was justified in abandoning the vessel and in failing to conclude and decide that

libellant abandoned the vessel without proper foundation of high probability that the vessel was then in imminent peril of destruction and that expense of recovering and repairing the vessel would exceed \$21,000.

## 28.

That the District Court erred in failing to conclude and decide that at the time of abandonment by libellant the vessel was not a constructive total loss within the terms of the policy sued upon and that libellant had no right to abandon the vessel and claim under the policy for constructive total loss.

## 29.

That the District Court erred in failing to conclude and decide that the policy sued upon required the libellant to sue, labor and travel for the defense, safeguard and recovery of the vessel.

## 30.

That the District Court erred in failing to find and hold that libellant failed to make reasonable, proper and practicable efforts to save and conserve the vessel and that libellant failed to make any effort to save and conserve the vessel after demand therefor by respondent made prior to any attempt by respondent to salvage the vessel and in failing to conclude and decide that such failure of libellant operated to bar recovery upon the policy for constructive total loss of the vessel.

31.

That the District Court erred in failing to conclude and decide that the policy sued upon expressly declared and provided that no act of respondent in recovering, saving or preserving the vessel should be considered as a waiver or acceptance of abandonment and that the acts of respondent in procuring the salvage and recovery of the vessel did not constitute a constructive acceptance of abandonment by libellant of the vessel.

32.

That the District Court erred in concluding and deciding that libellant was entitled to recover upon the policy for constructive total loss of the vessel.

Dated: Honolulu, Hawaii, May 5, 1950.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ ROBERT E. BROWN,  
Proctors for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF APOSTLES  
ON APPEAL AND PRAECIPE THEREFOR

To the Libellant above named:

To Hyman M. Greenstein, 501 Merchandise Mart  
Building, Honolulu, Hawaii, Proctor for  
Libellant:

To William F. Thompson, Jr., Clerk, United States  
District Court for the District of Hawaii:

The Appellant, respondent above named, hereby designates and requests that the record on appeal in the above-entitled cause shall include the following:

1. Libel in personam, Exhibit "A" annexed thereto, and monition filed July 6, 1949;
2. Answer filed November 3, 1949;
3. Findings, conclusions and opinion filed April 19, 1950;
4. Final decree filed April 25, 1950;
5. Bill of costs filed April 25, 1950;
6. Petition for appeal and order allowing appeal filed May 5, 1950;
7. Bond on appeal filed May 5, 1950;
8. Citation on appeal;

9. Assignments of error proposed by Appellant;
10. Transcript of the record of all oral testimony adduced at the trial herein;
11. All documents, records and papers admitted into evidence at the trial herein;
12. All of the clerk's minutes in all matters pertaining to the above-entitled cause.

Dated: Honolulu, Hawaii, May 5, 1950.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ ROBERT E. BROWN,  
Proctors for Respondent-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1950.

In the United States District Court for the  
Territory of Hawaii

Admiralty No. 417. Suit on Maritime Insurance  
Policy

FULGENCIA D. CADIENTE,

Libelant,

vs.

THE INDEMNITY MARINE ASSURANCE  
COMPANY, LIMITED,

Respondent.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. Dis-  
trict Court, Honolulu, T. H., on January 16,  
1950, at 9:38 a. m.,

Before: Hon. Delbert E. Metzger,  
Judge.

Appearances:

HYMAN M. GREENSTEIN,  
Proctor for Libelant;

THOMAS M. WADDOUPS, and  
ROBERT E. BROWN, of  
ROBERTSON, CASTLE and ANTHONY,  
Proctors for Respondent.

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente, Libelant, versus The Indemnity Marine Assurance Company, Limited, Respondent, for trial.

Mr. Greenstein: Ready for the Libelant.

Mr. Waddoups: Ready for the Libelee.

The Court: You may proceed.

Mr. Greenstein: If the Court please, very briefly this is a suit on a maritime insurance policy in which the Libelant is going to attempt to prove that there was a constructive total loss on the fishing sampan insured by the Respondent herein, and that the amount of the insurance, \$10,500, is payable by virtue of the terms of the policy.

I should like to call as our first witness Mr. Hiberley.

WARDE C. HIBERLY

A witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. Warde C. Hiberly.

Q. And what is your profession or occupation?

A. Assistant Collector of Customs, Customs District Thirty-two.

Q. That is this district, is it not? [1\*]

A. That is correct.

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\* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Warde C. Hiberly.)

Q. And where is your office, sir?

A. Federal building, Honolulu.

Q. And is it one of the functions of your office to register vessels that sail the Hawaiian waters?

A. That is correct.

Q. Have you had occasion to examine the records of your office relative to a vessel known as the "Miss Philippine"?

A. I have.

Q. And to whom was a permanent license issued covering the Oil Screw "Miss Philippine"?

A. To Mrs. Fulgencia Domingo Cadiente.

Q. And according to your records she was the owner of that boat on the 6th day of June, 1949?

A. That is correct.

Q. Have you also examined your records to see whether or not Mrs. Fulgencia was a registered owner of any other boat?

A. I have.

Q. And is she the registered owner of any other boat?

A. She is not, according to the records on file in our office.

Q. Now, what license was issued to her?

A. Permanent license No. 16 [2]

Q. And does she still hold that license?

A. That has been surrendered.

Q. Upon whose request was it surrendered, if you know?



(Testimony of Warde C. Hiberly.)

A. On the request of this office, of my office.

Q. Why did your office request the surrender?

A. The vessel was stranded and abandoned.

Mr. Waddoups: May I have that last question?

(The Reporter read the last question and answer).

Mr. Greenstein: You may question.

Mr. Waddoups: No questions.

Mr. Greenstein: Thank you.

(Witness excused).

### IRVING H. PARIS

a witness in behalf of the Libelant, being duly sworn, testified as follows:

#### Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. Irving H. Paris.

Q. And by whom are you employed, Mr. Paris?

A. The Bank of Hawaii.

Q. And do you come here today as a representative of the Bank of Hawaii in pursuance to a subpoena issued on the bank? [3]

A. I do.

Q. Do your records show a loan to a Fulgencia D. Cadiente in connection with a sampan, "Miss Philippine"?

(Testimony of Irving H. Paris.)

A. They do.

Q. And how much was that original loan?

A. Five thousand dollars.

Q. Has that amount been paid off?

A. It has.

Q. When?

A. On June 21, 1949.

Mr. Greenstein: May I ask that this be marked as Libellant's first exhibit for identification? (Referring to a document)

The Clerk: Libellant's Exhibit No. 1 for identification.

(The document referred to was marked "Libellant's Exhibit No. 1 for Identification".)

Mr. Greenstein: This is a policy. (Handing a document to Mr. Waddoups.)

Q. (By Mr. Greenstein): I show you Libellant's Exhibit No. 1 for Identification, which purports to be an insurance policy, and ask you whether or not the Bank of Hawaii has waived its rights under the loss payable clause there?

A. It has.

Q. So that the Bank of Hawaii has no interest in that policy? [4]

A. That is correct.

Q. And this is the regular Bank of Hawaii stamp on it? A. Yes, sir, it is.

Mr. Greenstein: Reading into the record: "Claim waived. Bank of Hawaii." With a signature, "June 2, 1949."

(Testimony of Irving H. Paris.)

Mr. Waddoups: No questions.

Mr. Greenstein: That's all.

(Witness excused.)

Mr. Greenstein: If the Court please, my next witness is out of order. He tells me that he has to go back on his boat. They are going out tonight. I didn't wish to call him at this stage, but I now wish to call him out of order.

Mr. Waddoups: No objection.

Mr. Greenstein: Mr. Hagood.

### CHARLES P. HAGOOD

a witness in behalf of the Libelant, being duly sworn, testified as follows:

#### Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. Charles P. Hagood, Charles P.

Q. What is your business or occupation, Mr. Hagood?

A. I am the master of the Motor Vessel "Mazie C," M-a-i-z-i-e, and initial C.

Q. And that boat is operated by what company, if you know? [5]

A. It is operated by King, Limited.

Q. Are you familiar with the vessel known as the "Miss Philippine"?

(Testimony of Charles P. Hagood.)

A. Yes, I am.

Q. Calling your attention to some time in the middle of June, 1949, did you have occasion to attempt salvage operations on the "Miss Philippine"?

A. Yes, I did.

Q. I show you a U. S. Hydrographic Office map No. 4116 and ask if you are familiar with such a map? (Showing a map.)

A. Yes, I am.

Q. You have that in your own cabin in your vessel?

A. Yes, I have.

Q. And was that map used in connection with your salvage operations with the "Miss Philippine"?

A. Yes, I used this in navigating to the spot.

Mr. Greenstein: We should like at this time to offer it in evidence. Is there any objection?

Mr. Waddoups: No objection.

The Clerk: That will be Libelant's Exhibit "A."

(The map referred to was received in evidence as Libelant's Exhibit "A.")

Q. (By Greenstein): Now, Mr. Hagood, under whose authority and direction did you commence the salvage operations? [6]

A. Actual salvage operations was commenced under the authority of Mr. Matthew of the insurance and bonding agency. He was representing the insurers of the vessel.

Q. And it is clear, though, that neither of the

(Testimony of Charles P. Hagood.)

Cadientes authorized you to undertake the salvage operations, is that correct?

A. At one time he did. He later rescinded that authority.

Q. But your specific salvage operations upon which you embarked were not as a result of any instructions on the part of the Cadientes?

A. No, they were not.

Q. As a matter of fact, they were in pursuance to a charter agreement, were they not?

A. Yes, that's right.

Q. Between King Limited and the insurance company? A. Yes.

Q. Do you have a log or some memorandum with you in telling us just what your operations consisted of, the date you started, and the story of the attempted salvage, salvaging of the "Miss Philippine"?

A. Yes, I do. I have the log, I have the log of the "Maizie C" which gives simply the operations of the "Maizie C" as involved in the salvage operations, and I also have a copy of a report which I submitted to the insurance company [7] upon completion of the salvage job.

Q. Now, could you tell us in your own words about the salvage operations commencing with the time you left Honolulu and the dates and various places, referring to your log if you will, if you need to, and tell us when you started, when you left Honolulu, when you arrived where the "Miss

(Testimony of Charles P. Hagood.)

Philippine" was, and how you got it off the reef, if you did, and so forth and so on? Can you do that? A. Yes, I think so.

Mr. Waddoups: May we see the log first? (Witness hands a book to Mr. Waddoups.)

A. Started the job on Friday, 10 June, 1949. Shall I give you an account of the operations?

Q. Will you give us a detailed account starting with the time you left Honolulu to where the "Miss Philippine" was?

A. On Friday the 10th of June, 1949, I got under way with the "Maizie C" at 1903 hours, to Kaupo, Maui—

Q. Under way from where?

A. From Pier 5, Honolulu. I arrived at Kaupo, Maui, at 0945 on Saturday the 11th of June, and anchored and commenced rigging up the necessary equipment to attempt to pull the vessel off the rocks.

Q. Where was the "Miss Phillipine"?

A. The "Miss Philippine" was lying at about the high [8] water mark on a rocky shore on the windward side of the island of Maui.

Q. Mr. Hagood, are you able to go to the blackboard and show us on Exhibit 1 where Kaupo, Maui, is? A. Yes.

Q. Put that in a red circle. (Witness writes on map.) Will you resume the stand, please? Will you continue in your story and tell us about the salvage operations?

A. The "Miss Philippine" was lying broadside

(Testimony of Charles P. Hagood.)

on the beach on a rocky shore at about the high water mark, rocking heavily every time a swell hit her, and beating up her bottom pretty badly. So after anchoring in seven fathoms of water, I put my boat in the water and went ashore to survey the wreck. It was necessary to float my supplies in to the beach on a rubber flotation bag, bags which I brought along for the purpose of keeping the vessel afloat once it came off. And I went in through the surf. It was rather difficult to get ashore because there wasn't any good landing there. The only way I could get in was to swim ashore. It was impossible to beach a boat. I went aboard the wreck and made a hasty inspection of it and satisfied myself that the wreck would not come apart if I were to get it off the beach.

I rigged up a towing bridle on the wreck, consisting of a  $\frac{7}{8}$  steel wire bridle which I passed all the way around the wreck, and secured it to the wreck so it wouldn't drop [9] off. Then I shackled in a towing hawser which I had to run ashore from the salvage vessel, the "Maizie C." The towing hawser was a 10-inch manila hawser.

At 1730 hours on Saturday, the 11th of June, the preparations were complete for pulling the wreck off the beach. So I took the strain and commenced heaving of the wreck. The wreck moved seven or eight feet and then, as the tide was ebbing, it stopped moving. I went ashore and talked with Mr. Gallagher of the American Bureau of Shipping

(Testimony of Charles P. Hagood.)

and requested that he secure a bulldozer to assist in moving the wreck; if necessary, to wait for the high tide again tomorrow before I could start pulling on the wreck. So I eased off the strain on my tow line and prepared to lay there overnight, to prepare to wait for the next tide.

On Sunday, the 12th of June, at 1145 in the morning, I tightened up my towing hawser and started to take the strain. Mr. Gallagher had secured a bulldozer from the Kaupo Ranch and had the bulldozer operator assist me in pulling the wreck off by pushing the bulldozer from the shore. At 1400 hours on Sunday the wreck started to move. At 1430 the wreck came off the rocks and into deep water. It immediately started to list, keel over to one side, and I started heaving the towing line to bring the wreck alongside of the—before I could get the wreck alongside, the wreck turned over. It was floating bottom side up. There was [10] no danger of it going down because I had rubber floatation bags inside which neutralized the weight of the thing and kept it afloat.

I got away from Kaupo at about 1535 that afternoon, and my original plan was to go to Kihei Landing and secure the landing there. I continued towing the vessel upside down toward Kihei Landing, but on arriving at Kihei Landing I determined that it was impractical to put it in there because it would probably break up due to the surge that was running at the landing. I changed my plans



(Testimony of Charles P. Hagood.)

and decided that the nearest safe port was Kaunakakai, Molokai. So I continued to tow the vessel to Kaunakakai.

Q. Mr. Hagood, I wonder if you would interrupt at this time and show us the route which you took on the map?

A. Commencing at the scene of the wreck at Kaupo, I ran down the coast of Molokai—Maui, that is—because the weather was making up and I didn't want to take a chance on running a shorter run around Kahului, because it is all on the windward side and I couldn't get the wreck in its capsized condition in Kahului without breaking up. So I took the easier but longer way downwind until I got into the lee of Maui, and then running into Puunoa, which is smooth water, I continued down towards Kaunakakai. At this point here (indicating on map) off Lahaina, Maui, the weather was very smooth, the water was very smooth. [11]

In the early morning I went back in a skiff and went aboard the wreck and made an inspection of the condition of the wreck before I ventured to take her across the open channel into Kaunakakai. The inspection of the wreck convinced me that it was in good enough shape to take it into Kaunakakai. I will give you a detailed finding but I will have to refresh myself continuing—

Mr. Waddoups: At this time, so that everything may be clear, we'd like to make it plain that by not objecting to his use of the word "wreck"

(Testimony of Charles P. Hagood.)

we are not admitting that it was a wreck. I assume he is using that as a nautical term.

Mr. Greenstein: I will concur in that. It is being used, I am sure, just as a nautical expression.

The Court: All right. There is nothing to worry about. Go ahead.

A. (Continuing): From Lahaina I proceeded across Kalohi channel to Kaunakakai. I arrived at Kaunakakai early in the morning.

Q. Would you mark that with a circle also? (Witness writes on map.)

A. I arrived at Kaunakakai early in the morning, took the wreck, "Miss Philippine," in and secured it to Kaunakakai dock in deep water, smooth water with no breakers. And, as my contract with the insurance company had already expired, as soon as I made the vessel fast to Kaunakakai dock I got [12] under way to Honolulu and returned to Honolulu and left the wreck secured to Kaunakakai dock in no danger of any further damage from the wind or weather.

The Court: Well, is there a wharf at Kaunakakai?

The Witness: Yes, there is a wharf at Kaunakakai that is used——

The Court: I meant at Kihei. You referred that you took her to Kihei.

The Witness: There had been a wharf at Kihei

(Testimony of Charles P. Hagood.)

the last time I was in there, which was in 1946. However, its existence was somewhat doubtful in my mind as I hadn't been in there since 1946 and I heard rumors that the Army was intending to take it out, to demolish it. So rather than waste the time to run into Kihei and look and come out again, I decided, since the weather was so smooth, to continue right on to Molokai where I knew there was cranes on the dock that were capable of lifting the wreck and do the work on it. At Kihei there were no cranes and no facilities whatsoever for dry-docking or salvaging operations. I didn't go into Kihei at all because I was moving so slowly and it would have taken four or five extra hours.

Q. (By Mr. Greenstein): Will you resume your chair, please. Now, Mr. Hagood, the "Miss Philippine" was being towed that entire route bottom side up, was it not? [13]

A. Yes, that's right. It was bottom side up.

Q. Now, didn't the original charter party between your company and the insurance company call for the towing of that vessel to Honolulu?

A. I never saw a copy of the charter agreement. I was acting only under verbal orders from my superiors in the organization. I don't know what the charter called for. My instructions were to go and attempt to salvage the wreck and to deliver it to the nearest safe port and to use my judgment throughout wherever, in whatever way I thought advisable.

(Testimony of Charles P. Hagood.)

Q. Do I understand, then, that as skipper of the "Maizie C," the salvage vessel, you never intended to attempt to bring the "Miss Philippine" all the way to Honolulu?

A. My original plan was to take it to Kahului, Maui. I discussed that with Mr. Gallagher of the American Bureau of Shipping. And I went so far as to call Kahului Railroad who owns the only dry-docking facilities on Maui, and make arrangements for housing "Miss Philippine" in the event I should successfully get it to Kahului. But as I said, in my judgment I determined that it would be wiser to take the longer and smoother route rather than attempt to tow her through rough water on the windward side of Maui.

Q. Well, when you towed her alongside of Kaunakakai—are there facilities there for repairing or docking the [14] vessel?

A. There are no repair facilities but there were two cranes, two large pineapple cranes that I believed were capable of picking the wreck out of the water. She was subsequently picked out of the water by one of those cranes and is now ashore in Kaunakakai in the back yard of a friend of mine.

Q. I beg your pardon?

A. In the back yard of a friend of mine up in Kaunakakai, a fellow by the name of Hanky Yamamoto.

Q. Mr. Hagood, when was the last time you saw this boat?

(Testimony of Charles P. Hagood.)

A. Some time in September. I can refresh my memory from my log, if you will allow me to. It was on Friday, the 30th of September. I was in Kaunakakai with the "Maizie C" and I went ashore and contacted Mr. Yamamoto and went with him to his house, took a look at "Miss Philippine" where he had it sitting up on blocks in his back yard.

Q. Will you describe the condition of the "Miss Philippine" as you then saw it?

A. Yes, I can. It was pretty badly beaten up. The engine had been removed. The pilot house had been, and cabin, had been completely taken off. The hull had been pierced, the hull planking had been pierced and a large timber pierced right through the planking in order to support it on blocks, [15] because the keel was pretty badly shot up.

Q. How about the bottom of the boat? In what condition was that?

A. The bottom of the boat had approximately 50 per cent of the planking of it, I'd say at a rough guess, stripped off of it, either broken off or stripped off. And the keel was chafed but not completely destroyed. I would say the deepest nick in the keel was roughly 60 per cent of the entire strength of the keel. About 10 or 12 ribs were missing in the engine room, and the sponsons had been crushed in by the wire rope slings that Mr. Yamamoto had passed around the vessel so that the crane could pick it up and swing it over on to the dock. A con-

(Testimony of Charles P. Hagood.)

siderable amount of that damage was done in picking it out of the water and setting it on the dock. It wasn't all done by the action of the wind and waves. Also there were worms, marine worms, starting into the chafed sections of the hull planking where the bottom was painted and knocked off, and the planking had been splintered and torn. The marine worms had got a pretty good start in there, too.

Q. So that the vessel, when you last saw it, was or was not in a seaworthy condition?

A. It was definitely not in a seaworthy condition. In fact, it had no further value to me as far as I could see. I wouldn't have taken it as a gift at that point. [16]

Q. Could you characterize its condition at that time as a total loss from the standpoint of a fishing vessel?

Mr. Waddoups: We will object to that question, your Honor, on the ground that the condition of the vessel at that time in September 30th, as to whether or not it was a total loss, is immaterial here because there is a statement that has been made that the ship had been abandoned by the owner. That is not the time to measure whether or not under the terms of the policy it was a total loss or a constructive total loss, that could be determined at the time of going ashore. We submit that what its appearance was on September 30th, three months after the beaching occurred, is not material to this inquiry.

(Testimony of Charles P. Hagood.)

Mr. Greenstein: I'd like to submit that under the rider of the same policy, which we have not yet introduced into evidence, we are going to argue that the ultimate condition of the vessel is of importance and is relevant. May we ask that the question be permitted to go in, subject to renewed objection?

Mr. Waddoups: There is a further objection to this question. The testimony of this witness is that a considerable amount of the damage that was reflected by the appearance of the boat on September 30th, 1949, was caused by the operation and lifting it out of the water and beaching it, putting it into Yamamoto's back yard. [17]

The Court: Answer the question.

(The Reporter read the last question.)

A. I am not a fisherman and therefore I don't feel that I am thoroughly qualified to say whether it could be used as a fishing vessel or not. I have already stated that at the time I saw the wreck in Mr. Yamamoto's back yard that its condition was such that I would not have accepted it as a gift. I think that answers your question.

Mr. Greenstein: If the Court please, I am not too familiar with the rules here, but if permission is necessary I should like to be able to put him on, on the theory of this witness, as an adverse witness from here on.

Mr. Waddoups: This witness is not a party,

(Testimony of Charles P. Hagood.)

your Honor. I don't see how he can be called an adverse witness.

The Court: Proceed.

Q. (By Mr. Greenstein): Mr. Hagood, isn't it a fact that the last time I talked to you in describing the condition of the boat you characterized it as being a total wreck, when you last saw it in Yamamoto's back yard?

Mr. Waddoups: Objected to as leading, your Honor.

The Court: The objection is overruled.

A. In my opinion it was as I said, a total wreck. I would have no use for it. I couldn't possibly consider it to be of any value. However, other people do think that [18] it might have value, namely, Mr. Yamamoto. He thinks he's got something that is worth some money. He told me so at the time.

Mr. Greenstein: I move that that be stricken as not responsive to the question.

The Court: All right.

Q. (By Mr. Greenstein): Mr. Hagood, can you tell us something about the character of the waters between your point of origin, Kaupo, and the Island of Oahu from the standpoint of waters being rough or calm, with respect to or from Maui to Oahu?

Mr. Waddoups: That is, if he was coming to Oahu. That is not proper. He said his instructions were to put it into the first safe port.

The Court: Well, it doesn't appear to me to be



(Testimony of Charles P. Hagood.)

in any manner material. But since it is preliminary, you may answer the question.

A. From Kaupo to Lahaina, Maui, you are traveling mostly in the lee of the prevailing winds, and it is very smooth, under normal tradewind conditions. As soon as you come out from behind the northwest point of Maui, you encounter tradewinds sweeping down the channel between Maui and Molokai. It is still a trifle rough but not as rough as the channel between Molokai and Oahu. As you can see (referring to map), the channel between Molokai and Oahu [19] is much wider than the one between Molokai and Maui, and it is a much longer trip and there is little or no protection from the wind and the waves that prevail in normal tradewind weather.

Q. So isn't it a fact, Mr. Hagood, that the reason you didn't continue to tow the vessel to Honolulu is because of that channel and the condition of the "Miss Philippine"?

A. That's right. In her capsized condition she made a very heavy drag, and I was only able to move it very slowly.

Q. How fast were you going, by the way, average?

A. Approximately one and eight-tenths knots per hour. That is very slow. And it would have taken me nearly two days to—well, I will revise that—make it 30 hours. It would have taken me about 30 hours to tow the wreck at the speed that

(Testimony of Charles P. Hagood.)

I was making from Kaunakakai on into Honolulu. And I was afraid at that time that the weather would increase in intensity and I stood a chance of losing the wreck in the channel between Molokai and Oahu.

Mr. Greenstein: Your witness, Mr. Waddoups.

### Cross-Examination

By Mr. Waddoups:

Q. Mr. Hagood, you first saw this boat under directions of Mr. Cadiente, did you not?

A. That's correct.

Q. The first time you saw her after she went ashore? [20] A. Yes.

Q. And that was on June 7, 1949, is that correct?

A. Do you mind if I refresh my memory from my log? These dates are a little bit vague in my mind.

Q. You may.

A. That's right, Tuesday afternoon of June 7, 1949.

Q. On that occasion you flew over to the wreck by charter plane from Kahului, is that correct, or from Wailuku?

A. Yes, from Maui I chartered a small plane and flew over the wreck with the idea of determining whether the wreck was salvagable, and also scouting out the approaches to the wreck and locating possible shoals and rocks and other danger

(Testimony of Charles P. Hagood.)

that would beset my vessel in going in to attempt to salvage it.

Q. And on that occasion did you land the plane and go down and examine the vessel?

A. No, I didn't.

Q. How low did you fly around the vessel?

A. The pilot told me that our altitude was approximately 150 feet from the vessel while we were circling the wreck. We circled the wreck for about 20 minutes at an altitude of about 150 feet while I satisfied myself that I could get the wreck off into deep water.

Q. And did you advise Mr. Cadiente as to whether or not this vessel was salvagable at that time? [21]

Mr. Greenstein: That is objected to, if the Court please, as being beyond the scope of cross-examination. It might be proper if Mr. Waddoups later wants to make this witness his own witness.

The Court: I think the objection is well taken.

Q. (By Mr. Waddoups): Did Mr. Cadiente at any time tell you to salvage the vessel, Mr. Hagood?

Mr. Greenstein: That is objected to for the same reason.

Mr. Waddoups: He has stated on direct examination that he started the salvage at one time and then quit. I want to know at whose instructions it was that he started and then gave up salvage operations the first time.

Mr. Greenstein: I will withdraw that objection.

(Testimony of Charles P. Hagood.)

A. Mr. Cadiente authorized me to proceed with the salvage operation on the vessel when I met him at Hana airfield after landing, after I had scrutinized the wreck from the air.

Q. On June 7th? A. That's right.

Q. And did he later withdraw that authorization to salvage? A. Yes, he did.

Q. And when was that?

A. He sent me a message via the U. S. Coast Guard [22] duty officer in the Federal Building in Honolulu which I received at about 10:30 Wednesday morning, June 8, 1949, cancelling the job, as in Mr. Cadiente's opinion the wreck is beyond salvage. That was the message as I received it relayed through the Coast Guard. I don't know how Cadiente contacted the Coast Guard, but that is the way I got the message.

Mr. Cadiente appeared in my office the following day, Thursday morning, and personally confirmed the order to cease operations.

Q. And, Mr. Hagood, do you remember the condition of that vessel on June 7th when you first saw her and her condition when you began salvage operations under the directions of the insurance company?

A. What I saw from the air didn't show me anything as to the condition of the bottom of the vessel.

Q. So you are unable to make it?

(Testimony of Charles P. Hagood.)

A. I am not qualified to say. Externally she appeared just about the same.

Q. Did you make an examination of that hull prior to your salvage operations?

A. The first examination I made of the hull was on Saturday morning, the 11th of June. That was the first close examination I made of it. Up until then the nearest I had been was about 150 feet away up in the air in an [23] airplane. However, her position hadn't changed on the rocks. She was lying just about the same way. She hadn't gone farther up and she didn't seem to have changed in her position at all, mainly because the weather was fairly smooth at the time.

Q. And was the condition of her hull at that time such as believed you to think that you could pull her out hull down, keel down I mean? What I am getting at, Mr. Hagood, is, you felt from your examination that you could successfully tow her?

A. Yes, I would, definitely, or I wouldn't have undertaken it.

Q. And was the condition of her hull at that time any different than the condition of her hull was on September 30th when you saw her in Yamamoto's yard?

A. She was in a lot better condition on the 10th of June when I first examined her than she was on September 30th in Mr. Yamamoto's back yard.

Q. Well, you mean a lot better? How would you

(Testimony of Charles P. Hagood.)

describe her? What was the damage to her hull that you noticed before you started salvage operations?

A. As near as I could determine when I went aboard her, her keel was still intact although chafed on the bottom. There were four or five ribs knocked out in the engine room. The fore peak, forward compartment of the vessel, was knocked [24] out. The engine bed was intact and the engine was tightly secured to the engine bed.

The bottom planking was about 25 per cent gone. All of this is a rough estimation as it was very difficult to make a close examination of the wreck because the waves were breaking over it and the wreck was slamming back and forth from one side to the other with considerable violence. And their plan was rather important to me. I didn't waste too much time looking things over. I simply made, satisfied myself that the wreck would stay together and wouldn't come apart when I started pulling on it, and also satisfied myself that when I took it off it would remain towable. I could handle it once I took it off. The fact that it finally turned turtle after I took it off was due to the flotation bags that I lashed inside the hull shifting and becoming jammed and putting the center of gravity of the wreck too high. The center support was too low. That's why she turned turtle.

Q. Now, Mr. Hagood, recalling the vessel's position on that shoreline and the nature of it, the

(Testimony of Charles P. Hagood.)

rocking, the rocky nature of the land, was she so situated on that beach so that in your opinion her hull and keel could be damaged by changing tides, by action of the ocean?

A. Yes, very definitely. She was sitting on a rocky beach. To pull a boat—and on the windward side of the [25] island she had no protection whatsoever, and the waves were breaking against her and every time a wave would hit her she would rock from one side to the other on her keel, slam down on her ribs with the force of a piledriver, it seems like, when I was inside her.

Q. So that it is a reasonable thing to state, is it not, that the longer she stayed on that beach in that condition the more her damage increased by action of the ocean?      A. Yes, that is true.

Q. Now, what was it, these flotation bags that you had spoken of? I'd like to get that a little clearer in my mind. You say in your opinion it caused her to turn turtle ?

A. The flotation bags are large rubberized canvas bags which can be inserted inside of a hull and blown up to provide buoyancy. I have used them from time to time in other salvage operations; when you have to have some buoyancy to keep her from going down, you use the flotation bags. So I brought these bags with me with an air compressor, and filled them with air and inserted them inside the hull before I took her from the

(Testimony of Charles P. Hagood.)

rocks, to keep her from going right on down, because her bottom was torn out of her and she wouldn't float as a boat is supposed to float. These were simply to give her additional buoyancy. They are bags about four feet in diameter and about twelve feet long, and you fill them up with air. I had three of them. [26]

Q. Now, who instructed you? Did anyone instruct you to go into Kaunakakai from your office, King Limited?

A. Yes, I was in periodical contact with the home office by radiophone, and from time to time I would call them and my instructions were to take her into the nearest safe port and leave her, as our contract with the insurance company had a fifteen hundred dollar limit on it. And the insurance company had authorized us to spend fifteen hundred dollars worth of charter time on it and to go no further unless I received authorization in writing from Mr. Gallagher of the American Bureau of Shipping. He was representing the insurance company. The fifteen hundred dollars limit was exceeded by my calculations about the time I was abeam of Lahaina, Maui. At that time I could have taken her into Mala wharf on Maui and tied her up, but there is no crane or any salvage facilities available there and it was a bad surge, there was a bad surge on the dock that would have broken up the hull in a matter of a day or two.

I continued to tow the vessel across the channel



(Testimony of Charles P. Hagood.)

and put her into Kaunakakai. I couldn't very well abandon her in the middle of the ocean because I would have gotten into trouble with the U. S. Coast Guard for leaving a menace to the seas. So I had to take her some place and I dragged her to Kaunakakai. It was easier to drag her out and do something. [27]

Mr. Waddoups: No further questions.

### Redirect Examination

By Mr. Greenstein:

Q. Mr. Hagood, I wonder if you'd be good enough to show us where Mala wharf is on the exhibit?

The Court: I don't think that is necessary. I know where it is.

Mr. Greenstein: Well, might we have that pointed out on the exhibit, if the Court please?

The Court: If it is of value to you.

(Witness writes on map.)

A. Mala wharf is on the westward shore of Maui, about a mile northwest of Lahaina, Maui.

Q. So that the fifteen hundred dollars worth was used up by the time you reached the beam of that wharf, is that correct, Mr. Hagood?

A. That's right. From there on I didn't know who was going to pay me. So I was anxious to terminate the job as soon as possible so as to cut down my own expenses and get back because I had

(Testimony of Charles P. Hagood.)

no assurance of being paid by anybody, either Cadiente or the insurance company. However, acting in the interests of whoever was the owner of the vessel—I wasn't sure who was the owner of the wreck—but acting in the interests of the owner I continued to tow it to what I considered to be the nearest safe port, because in my mind [28] the vessel still had some value.

Q. Now, in response to Mr. Waddoups' question as to one of your earlier examinations in your opinion that the vessel could be towed into the harbor, do you mean it could be towed into Honolulu Harbor?

A. Towed into Honolulu Harbor from where? I don't quite understand your question.

Q. Well, you saw the boat when she was beached at Kaupo before the salvage operations were begun?

A. Yes.

Q. And Mr. Waddoups directed questions to you relative to the condition of the boat as a result of your examinations and asked you whether or not it could be towed into the harbor, and you answered "Yes, it could be." You felt it could be towed into the harbor. And that, I assumed, was why the salvage operations began later. I ask you to tell us what you meant by the word "harbor"? Do you feel that the boat could be safely towed to Honolulu Harbor at that time?

A. At that time I hadn't foreseen the possibility of the vessel turning over. I had planned on

(Testimony of Charles P. Hagood.)

pulling it off and maintaining it in an upright position by means of the flotation bags. However, before I could bring the wreck alongside of me, it turned over and then I was unable to turn it back up again. So that necessitated a change [29] in my plans. I could have towed it to Honolulu Harbor, I believe, if it had remained in an upright position, because then I could have towed it about twice as fast. Since it was upside down and its cabin and flying bridge and the framework and everything involved in the flying bridge was sticking down in the water, it presented considerable resistance to the water as it was pulled ahead. But if it had remained in an upright position it would have towed just like a vessel; everything would have been streamlined on the bottom.

Mr. Greenstein: No further questions.

Mr. Waddoups: No further questions.

The Court: All right.

(Witness excused.)

Mr. Greenstein: Mr. Morton.

## HENRY MORTON

a witness in behalf of the Libelant, being duly sworn, testified as follows:

## Direct Examination

By Mr. Greenstein:

Q. Will you tell us your name, please?

A. Henry Morton.

Q. What is your business or occupation, Mr. Morton? What do you do?

A. Fishing. [30]

Q. And you work for Mr. Cadiente, is that it?

A. That's right.

Q. Were you skipper of the "Miss Philippine"?

A. That's right.

Q. Do you remember June 6, 1949?

A. Yes.

Q. Tell us what happened that day?

A. Well, on June 6, 1949, we left Hana on our way back to Honolulu. On the way coming back we stopped at Kaupo, Maui. We spotted a school of fish there, so we decided to surround that fish before we come back to Honolulu. Well, anyway, we load our nets, surround the fish. We were all in the water. We noticed the big boat was drifting. We tried to get on the boat and got on it, started the engine. The propeller and the rudder was gone. And she hit the rocks there. So we tried to pull it by hand, because the propeller and rudder was gone. We couldn't do it. The swells and the wind

(Testimony of Henry Morton.)

was so strong. Well, anyway, there's a minister there; he called for the Coast Guard. Well, we tried to pull the boat out by hand but couldn't move it.

So when the Coast Guard got there, it was too rough. They couldn't get near to our boat. So I sent two of my men to swim out to the Coast Guard and tell them that there is nothing they could do, to tow the skiff to Lahaina. We had the skiff anchored outside in the water. So I went back to [31] the boat there and tried to save what we could, but couldn't do nothing.

The next thing I noticed, the water was coming through the engine room. The bottom was broken. Then I noticed fish was drifting all around the beach there. The ice box was broken. The whole bottom was gone. So the swells was getting up bigger and the wind was getting stronger. So I didn't want nobody to get hurt, so I told them we had to abandon this ship. And the only thing we could do is wait for the boss to see what he wants to do.

Q. When did the boss come?

A. The next day.

Q. That's Mr. Cadiente you are referring to?

A. That's right.

Q. How long were you at Kaupo?

A. Three days.

Q. And did you try to get the boat off the reef?

A. That's right, but couldn't do nothing be-

(Testimony of Henry Morton.)

cause we didn't have no equipment there. The swells was so high, couldn't do nothing.

Q. Did you come down to see the boat every day?

A. That's right, every day for three days.

Q. Can you describe the condition—withdraw that. Can you describe the weather condition and the waves?

A. Well, the waves were pretty high and the wind was [32] so strong that we couldn't do nothing. The boat was just pounding on the rocks there, rolling back and forth. It was too dangerous to get on the boat to do anything.

Q. And did you then return to Honolulu?

A. On the third day.

Q. At whose request did you leave Kaupo?

A. At the boss' request.

Q. That is Mr. Cadiente? A. That's right.

Q. Was that the last time you have seen the "Miss Philippine"? A. That's right.

Mr. Greenstein: You may examine.

### Cross-Examination

By Mr. Waddoups:

Q. Nobody was on board the "Miss Philippine" when the rudder and the propeller was lost, is that correct? A. No, sir.

Q. Was she anchored? A. That's right.

Q. What happened to the anchor rope, the chain?

A. The anchor chain busted.

(Testimony of Henry Morton.)

Q. And when did you first notice that she was drifting?

A. Well, about half an hour after we anchored.

Q. How far away was the big vessel from the skiff that [33] you had in getting the fish in?

A. About three hundred feet.

Q. You paddled over to her as soon as you noticed her drifting?

A. We couldn't paddle. We had to swim.

Q. You swam over to the boat?

A. That's right.

Q. You yourself?

A. Myself and the rest of the crew.

Q. The whole crew?      A. The whole crew.

Q. How did you know that the rudder was gone?

A. When we started the engine, all you could hear was the engine running and you know the propeller is not in working order. So one of the boys jumped over the side and said there is no rudder and no propeller.

Q. How deep is the water there?

A. You mean where she——

Q. Where she was anchored.

A. About twelve fathoms.

Q. Was any attempt made to go down below and get the rudder and propeller?

A. No, it was too rough.

Q. Too rough?      A. Too rough. [34]

Q. Too deep?

A. Not too deep but too rough.

(Testimony of Henry Morton.)

Q. Well, the weather didn't stay rough all the time, did it? It calmed down?

A. It was rough ever since I was there.

Q. Well, weren't there some low tides and some high tides?

A. Oh, yes, high tide and low tide, but still the swells there.

Q. And during low tide wouldn't she be resting pretty quietly there?

A. Not in the three days I was there.

Q. So you made no attempt to go after the rudder and propeller?

A. No, sir, because it was too dangerous.

Q. Was this a twin-screw boat or one?

A. One screw.

Q. Just one?           A. That's right.

Q. How long after the boat went ashore on the beach on the rocks there did you get in touch with Mr. Cadiente?

A. Well, the next morning.

Q. Did you call him by telephone?

A. No, the Coast Guard called him.

Q. Well, when did you notify the Coast Guard to notify [35] Cadiente?

A. Well, that same—about an hour after the boat landed on the rocks on the beach, the minister there.

Q. And what time of day was it when it landed on the beach?

A. About 8:30 in the morning.



(Testimony of Henry Morton.)

Q. And was the tide a surging tide or was it ebbing at that time?      A. It was high tide.

Q. Was the tide coming in or going out?

A. Coming in.

Q. And when, if you remember, did the tide reach its high peak?

A. Well, that I can't say, the highest peak.

Q. Did you get out, get off the boat and go down under and look at the hull in the water?

A. You cannot go under the boat. You had to look from the top to the bottom.

Q. Couldn't you get outside and look at it?

A. No, it is too dangerous. The boat was rolling back and forth.

Q. Were you there when Mr. Frank Gallagher of the American Shipping Board came over? You know Mr. Gallagher?      A. No.

Q. Do you remember a haole man coming over there [36] during those first three days and looking over this boat?      A. No, sir.

Q. You don't remember that?      A. No.

Q. Where were you staying in Kaupo?

A. We are right on the beach. At night we go to Hana and sleep at Hana, on Hana wharf.

Q. But during the three days you spent all your time right there on the beach?

A. That's right.

Q. You don't remember Mr. Gallagher coming with Mr. Cadiente to look over this boat?

(Testimony of Henry Morton.)

A. Well, there were so many people there looking at the boat, I don't know who is who.

Q. Do you remember Mr. Hagood, the man who just left? Do you know Mr. Hagood?

A. I didn't see him.

Q. You didn't see him?           A. No.

Q. You didn't see anybody coming around and flying around?

A. Oh, I see an airplane flying around but don't know whose.

Q. You remember that, though?

A. Yes. [37]

Q. And who directed you to abandon the ship?

A. You mean when the boat——

Q. When you and your men abandoned ship, on whose orders was that?

A. I gave the orders.

Q. You gave the order?           A. That's right.

Mr. Waddoups: I have no further questions.

Mr. Greenstein: No further questions. I wonder if we might have a recess? I may need an interpreter on the next witness.

The Court: All right. We will take a brief recess. We will take a noon recess at half-past eleven.

(A recess was taken at 10:45 a.m.)

Mr. Greenstein: Mr. McAndrews.

JAMES T. McANDREWS

a witness in behalf of the Libelant, being duly sworn, testified as follows:

Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please, sir?

A. James T. McAndrews.

Q. Are you an officer of King Limited?

A. Yes, I am. [38]

Mr. Greenstein: May this be marked for identification?

(A document.)

The Clerk: Libelant's No. 2 for identification.

(The document referred to was marked "Libelant's Exhibit No. 2 for Identification.")

Q. (By Mr. Greenstein): I show you Libelant's Exhibit 2 for Identification and ask you if you have ever seen that before? A. Yes, I have.

Q. Does that bear your signature?

A. Yes, it does.

Q. And is that a charter party entered into by and between the insurance company and your company relative to salvage operations of the "Miss Philippine"?

The Court: What insurance company?

Mr. Greenstein: Let's see what it is?

The Witness: Indemnity Marine Assurance Company, Limited.

(Testimony of James T. McAndrews.)

The Court: Yes.

Mr. Greenstein: That is the respondent in this case.

The Court: Oh, yes.

A. Yes, it is.

Mr. Greenstein: I'd like to offer it into evidence, if the Court please.

Mr. Waddoups: No objection. [39]

The Clerk: Libelant's Exhibit "B."

(The document previously marked for identification was received in evidence as Libelant's Exhibit "B.")

## LIBELANT'S EXHIBIT "B"

### Charter Party

Whereas the sampan Miss Philippines is aground in the ocean at Kaupo, Maui, Territory of Hawaii, and

Whereas, Indemnity Marine Assurance Company, Limited, hereinafter known as Charterer, is the Insurer of said sampan, and desires that an attempt be made to float and tow same to a Marine Railway at Honolulu, Territory of Hawaii aforesaid, and

Whereas, King Limited, a Hawaiian Corporation of Honolulu, Hawaii hereinafter known as Owner, owns the oil screw Maizie-C, and is willing to let the use of same to Charterer upon the terms and conditions which appear below,

(Testimony of James T. McAndrews.)

Therefore it is hereby Mutually agreed by and between Charterer and Owner, as follows:

1. Charterer agrees to hire and Owner agrees to let the oil screw Motor Boat Maizie-C, official number 236082, for the purposes and on the conditions hereinafter set forth.

2. The said vessel Maizie-C shall get underway from Honolulu on or about June 10th, 1949, and proceed to Kaupo, Maui, and there control of said vessel shall pass to Mr. Gallagher, American Bureau of Shipping Surveyor, as agent for the Charterer, and the proposed salvage operations shall be conducted by his authority and under his direction. In the event that these are successful the Master of the Maizie-C shall then tow Miss Philippines to a Marine Railway at Honolulu aforesaid.

3. Charterer agrees to pay as hire for the said Maizie-C, her crew and equipment, without discount, the following sums:

a. \$15.00 per hour for the hire of the Maizie-C and her three regular crew members, computed from the time she is underway at said Honolulu, until she is again secured in said Honolulu at the end of her voyage.

b. \$1.00 per hour for the hire of each of three additional crew members, their time to be computed as provided for the Maizie-C in sub-paragraph a. (above).

(Testimony of James T. McAndrews.)

c. \$100.00 for the additional insurance premium which is to be charged the owners of the Maizie-C as a result of the said use.

d. Any and all other expenses incurred by the Maizie-C, her owner or agents, as a result of the said use and which are reasonably necessary thereto.

e. It is expressly agreed between the parties that if said salvage operations have not been successful at the time charges for the use of the Maizie-C, including charges for the return to Honolulu, amount to \$1,500.00, said operations are to be abandoned and the Maizie-C is to return forthwith to Honolulu, unless Charterer, through its Agent on the spot, authorizes a continuation of said operations in writing.

4. Salvage attempts are to continue so long as said Mr. Gallagher deems same feasible, subject, however, to the provisions of paragraph 3. e. above.

5. If Miss Philippine is damaged or lost during the salvage operations the Charterer shall be responsible therefor, and said Charterer hereby covenants to hold the Owner harmless on account of any claim as a result of such damage or loss.

6. Charterer, in consideration of the use of the Maizie-C, her tackle, engines, and crew, expressly agrees to pay for same as specified in paragraph 3 above, regardless of the success of operations and without set off in the event said Miss Philippine

(Testimony of James T. McAndrews.)

is damaged, destroyed or lost as a result of said operations or towage, even though such damage or destruction or loss is the result of the negligence of Owner, its agents or servants.

Wherefore, the parties hereto have set their hands this 11th day of June, A. D. 1949.

INDEMNITY MARINE ASSURANCE COMPANY, LTD. By its General Agent THE BONDING AND INSURANCE AGENCY, LTD, (a Hawaiian Corporation)

By /s/ A. H. MATTHEW,  
Its Charterer.  
KING, LIMITED,

By /s/ JAMES T. McANDREWS,  
Its Secretary.  
OWNER.

Admitted January 16, 1950.

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Q. (By Mr. Greenstein): Mr. McAndrews, the "Miss Philippine" was towed into Kaunakakai as part of the salvage operations of your company, was it not? A. That's correct.

Q. And you used the salvage vessel "Maizie-C" in connection with the salvage operations?

(Testimony of James T. McAndrews.)

A. Yes, that's correct.

Q. And the boat was tied up in Kaunakakai?

A. Yes. I didn't see it there myself, but so I understand it was tied up there.

Q. Where is the boat now, if you know?

A. Well, as far as I know it is in the possession of Hanky Yamamoto of Kaunakakai. I don't know where it is, though, exactly.

Q. Now, during the period of time that the boat was under the control of King, Limited, that is, after she was docked on Kaunakakai, were any attempts made to repair the vessel?

A. Well, it wasn't under our control after it was docked at Kaunakakai. And as far as the repair of the vessel is concerned, I don't know whether any attempt was made or [40] not.

Q. Well, let's put it this way: King, Limited did not attempt to return the vessel?

A. That's correct, we did not attempt to.

Q. And do you also know that neither the former owner and the insurance company attempted to repair it?

Mr. Waddoups: Objected to as leading. It is assuming something that is not in evidence.

The Court: Let me have that question.

(The Reporter read the last question.)

The Court: Sustained.

Mr. Greenstein: May we have this marked next in order for identification?



(Testimony of James T. McAndrews.)

The Clerk: Libelant's No. 3.

(The document referred to was marked "Libelant's Exhibit No. 3 for Identification.")

Q. (By Mr. Greenstein): I show you Libelant's for Identification No. 3, which purports to be a letter from attorneys King and McGregor. I take it they are attorneys for King, Limited, your company? A. That is correct.

Q. And was that letter written in pursuance to the instructions of your company?

A. Yes, it was. [41]

Mr. Greenstein: I should like to offer a letter into evidence, if the Court please, written on behalf of King, Limited, the party attempting to salvage here. It discloses their position in interest and also refers to the interest of both the former owner and the insurance company. We think it is material.

Mr. Waddoups: Objected to on the grounds that it is immaterial and incompetent and certainly irrelevant. Nothing that King and McGregor could do that should bind the defendant in this case. They are not parties to the proceedings. Any letter that was written by them to Mr. Greenstein or anyone else has nothing to do with the liability or lack thereof of the defendant under the policy of insurance.

Mr. Greenstein: If the Court please, we respectfully submit that it is one of the links of the chain which starts with the running aground of the vessel

(Testimony of James T. McAndrews.)

and its final location in the back yard of somebody's house on Molokai.

The Court: I don't know. This seems to me to be rather far afield. The sooner we get right down to the crux of this libel suit, just what the points are in issue here, and stick close to that, the better. It seems to me that we are running around to other matters.

Mr. Greenstein: Was there a ruling by the Court on that?

The Court: Well, if you think it is important, I will [42] hear your further argument on it.

Mr. Greenstein: Well, if the Court please, it is a letter written by the attorneys for King, Limited, who have conducted the salvage operations, addressed to myself as attorney for the former owner, setting forth the position—not only referring to our position—it sets forth the position of the insurance company. It also sets forth the intent of the salvager, which would go to the ultimate question here of the condition of the vessel. We have a situation in which three people throw their hands up and say, "We don't want the boat." I respectfully submit that is indicative of the ultimate question that has to be decided here, and that is the value, if any, of the boat.

Mr. Waddoups: Well, we submit, your Honor, that what another law firm does or says in a letter to Mr. Greenstein about the value of the boat is hearsay in the first place. It is certainly not bind-

(Testimony of James T. McAndrews.)

ing upon this insurance company and has no place in this controversy.

The Court: It may be marked for identification for the time being.

Q. (By Mr. Greenstein): Mr. McAndrews, was it in pursuance to authority given by King, Limited that Hanky Yamamoto took possession of the boat?

A. Well, I wouldn't say so exactly. All King, Limited [43] did was relinquish any right that they might have had to the vessel. In other words, if we had any right, we will say, we relinquished it.

Mr. Greenstein: Thank you. No further questions.

Mr. Waddoups: No questions.

(Witness excused.)

## DELESFORO CADIENTE

a witness in behalf of the Libelant, being duly sworn, testified as follows:

### Direct Examination

By Mr. Greenstein:

Q. Will you state your name, please?

A. Delesforo Cadiente.

The Court: What is the first name?

The Witness: Delesforo, D-e-l-e-s-f-o-r-o, B. Cadiente, C-a-d-i-e-n-t-e.

Q. Now, Mr. Cadiente, you are the husband of

(Testimony of Delesforo Cadiente.)

Fulgencia D. Cadiente, the libelant in this case, are you not?      A. Yes.

Q. And she is the registered owner of, or was the registered owner of the "Miss Philippine"?

A. Yes, sir.

Q. By the way, both you and Mrs. Cadiente are citizens of the United States, are you not?

A. Yes, sir.

Q. Now, who built "Miss Philippine"? [44]

A. Mr. Tanimura of the Kewalo Shipyard.

Q. He built the "Miss Philippine"?

A. Yes, sir.

Q. And has he built any other boats for you?

A. Yes, he did.

Q. How many others?      A. "Luzon."

Q. Now, how many others?

A. Two other boats.

Q. Now, these other boats, are they in your name or in Fulgencia's?

Mr. Waddoups: Objected to as incompetent, irrelevant and immaterial. We are interested in the "Miss Philippine," not in any others.

The Court: Sustained.

(Mr. Greenstein hands a sheet of paper to Mr. Waddoups.)

Mr. Greenstein: May this be the number next in order for identification?

The Clerk: Libelant's No. 4 for Identification.

(The document referred to was marked, "Libelant's Exhibit No. 4 for Identification.")

(Testimony of Delesforo Cadiente.)

Q. (By Mr. Greenstein): I show you Libelant's Exhibit No. 4 for Identification and ask you to tell us what it is?

A. This is a receipt for the building of [45] "Miss Philippine" from Tanimura.

Q. And how much did you pay for it?

Mr. Waddoups: Objected to as incompetent, irrelevant and immaterial. The value of the vessel for purposes of this investigation is set by the insurance policy itself, and it doesn't matter what he paid for it.

The Court: What is your idea?

Mr. Greenstein: We will withdraw that. It becomes important when the boat builder comes on the stand. We will not introduce it. I haven't offered it.

The Court: All right.

Q. (By Mr. Greenstein): I show you Libelant's Exhibit No. 1 for Identification and ask you what that is?

A. This is a policy for "Miss Philippine."

Q. When did you actually get that piece of paper?

A. After I paid my account with the bank.

Q. What bank? A. Bishop Bank.

Q. What bank? A. Bishop Bank.

Q. Will you look at the face of that and see what bank is mentioned?

A. Bank of Hawaii.

(Testimony of Delesforo Cadiente.)

Q. You paid off your account with the bank of Hawaii, [46] is that it? A. Yes.

Q. And they gave you that insurance policy?

A. Yes, sir.

Q. Did they have a mortgage on the "Miss Philippine"?

A. Yes, sir.

Q. Will you speak a little louder, please?

Mr. Greenstein: I should like to offer into evidence the receipt showing the premium on the policy issued by the bonding and insurance agency, The Bonding and Insurance Agency, Limited, the agent of the respondent herein, bearing the same number as the policy being sued upon.

Mr. Waddoups: No objection, your Honor.

Mr. Greenstein: And at this time I should like to offer into evidence Libelant's Exhibit No. 1 for Identification.

Mr. Waddoups: No objection.

The Clerk: The premium will be Libelant's Exhibit—

The Court: That No. 1 is the release of mortgage, is it?

Mr. Greenstein: No, No. 1 for identification is the actual policy.

The Court: Oh, the policy?

Mr. Greenstein: There are two releases on there.

The Clerk: The premium will be Libelant's Exhibit "C" [47] and the policy will be libelant's Exhibit "D."

(Testimony of Delesforo Cadiente.)

(The documents referred to were received in evidence as Libelant's Exhibits "C" and "D.")

Q. (By Mr. Greenstein): Now, Mr. Cadiente, what is your relationship to the boat "Miss Philippine"? What is your connection?

A. I am operating manager and manager of the boat.

Q. And as manager for the fishing vessel, have you been the one contacted with respect to the boat itself? A. Yes.

Q. You got the insurance? And the insurance company contacted you after the loss, did they not?

A. Yes.

Q. Will you tell us in your own words, Mr. Cadiente, what you know about the "Miss Philippine" when you first saw her after this loss?

A. June 6th in the afternoon the Coast Guard from the Federal Building called me up telling me that "Miss Philippine" is on Hana, Maui.

Q. Speak slowly.

A. They was trying to contact me from noon-time, but they had been unable to get me from nine o'clock. They called me again. And so I proceeded to Honolulu right away and talked to the Coast Guard. I never see him but I talked to him on the telephone, and he told me that the boat "Miss [48] Philippine" is at Hana, Maui, between plenty rock. So that's all what he told me.

And then in the morning, June 7th, I bought my

(Testimony of Delesforo Cadiente.)

ticket and fly to Maui. When I reach over there about four o'clock in the evening, and went right into the boat, where the boat was. That's Hana. So when I was there, I couldn't get near to the boat myself because the water was splashed all over the boat, but I was outside about, oh, about 25 feet away from the boat. And one side of the boat where there is no water, I can see the big hole there already. And also the water was flooding through the engine room and in the deck, under the deck. All the water splashing, and it kind of dark already, so I decided to go to Hana where the boys was.

Then early in the morning the next day—that's Wednesday—I called the boys and went back to the boat. So when we reach over there, still the water was so high that the boys was trying to get into there but I told them not to. And, well, some of the crew went swimming to the other side of the boat because we wanted to find out how is the condition of the boat, and also myself, too, look around, because I saw the water. So I see both sides of the boat, and all the keel almost gone, and some of the ribs gone. So I told the men in the boat, there is no hope in the boat anymore. So I just decided to leave the boat there and abandon the [49] boat.

Then I went to a telephone 'way up to the mountains, because I know there is no facilities over there and I cannot bring the boat back to Honolulu,



(Testimony of Delesforo Cadiente.)

because there is no equipment to bring down the boat; so I went up to the mountain and find a telephone there. Although they suggested and want to——

Q. Will you speak a little slower, please?

A. King, Limited wanted to salvage the boat. So I called up because I don't know how to get the King, Limited—I called up to the office of the Coast Guard and notified them to tell the King, Limited not to come over anymore and take the boat back.

Q. Pardon me. Was that before or after you and Mr. Hagood were out there?

A. After.

Q. Continue.

A. So it was about nine o'clock in the morning, about ten o'clock in the morning, when I come out. Then I went back again to the boat where the boys was, and still we can not get into the boat because too rough. So I told the boys, well, the best thing, the thing we cannot do here, we might as well go home; we cannot salvage the boat ourselves; there is no equipment here. So everybody take off. We went back to Hana. That's the last time that day. I come home to [50] Honolulu, went right away again to King, Limited to tell them the story that the boat was in a bad shape and it is hopeless to bring the boat back to Honolulu.

Q. So that you did not authorize the salvage operations, Mr. Cadiente, is that correct?

(Testimony of Delesforo Cadiente.)

A. No, sir.

Q. When did you next see "Miss Philippine"?

A. December 2nd.

Q. Did you go again in June?

A. Yes, I went on June 16th with the boat builder.

Q. With whom?

A. With the boat builder, to Kaunakakai.

Q. And where was the boat?

A. It was at a pier at Kaunakakai. The boat was hanging on the pier at Kaunakakai.

Q. Did you look at the boat?

A. Yes, sir, I did.

Q. Will you describe what was done so that you could look at the boat?

A. The boat was in the water. Since I brought with me the boat builder and I wanted him to know and see the condition of the boat, too, so I had a crane there. There was two cranes.

Q. Speak slowly.

A. There are two cranes there, so I hired one of them [51] to pull up the boat so we could see the condition of the boat, because it's in the water and we cannot see everything. So they pull up the boat. And what the condition of the boat was, it was almost the same as the condition that it was an Hana, Maui, that all the bottom was gone.

Q. When the boat was picked up in the air with the aid of a crane, were any pictures taken?

A. Yes, sir, there was. I took a picture.

(Testimony of Delesforo Cadiente.)

Mr. Greenstein: Any objection to the pictures?

Mr. Waddoups: No.

Q. (By Mr. Greenstein): Is this picture a fair representation of what you saw?

A. Yes, sir.

Q. Just answer the question.

A. Yes, sir.

Q. This is the picture when you had the boat up with the crane, is that it?

A. Yes, sir.

Mr. Greenstein: I'd like to offer this in evidence, if the Court please.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit "E."

(The photograph referred to was received in evidence as Libelant's Exhibit "E.") [52]

By Mr. Greenstein:

Q. And was this also a picture taken on the same day? A. Yes, sir.

The Court: What day was that?

Q. What day was that? A. June 16th.

Mr. Greenstein: That is offered in evidence as the next exhibit.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit "F".

(The photograph referred to was received in evidence as Libelant's Exhibit "F".)

By Mr. Greenstein:

Q. And did you return to Molokai again to see the boat?

(Testimony of Delesforo Cadiente.)

A. I went June 25th. That's the last time I saw the boat.

Q. Before we get to June 25th, were these pictures also taken on the 16th of June?

A. Yes, sir.

Mr. Greenstein: I'd like to offer this in evidence, this photograph.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit "G".

(The photograph referred to was received in evidence as [53] Libelant's Exhibit "G":)

By Mr. Greenstein:

Q. Were any pictures taken on the 25th day of June at Kaunakakai?      A. There was.

Q. There were some pictures taken?

A. Yes, there were some pictures taken on the 25th.

Q. Well, just answer the question whether these were the pictures that were taken and we will let Counsel see them.

A. Yes, sir, these are all the pictures taken on the 25th of June.

Mr. Greenstein: Any objection?

Mr. Waddoups: No.

Mr. Greenstein: We should like to offer into evidence these five photographs taken on the 25th day of June, 1949.

Mr. Waddoups: No objection.

The Clerk: "H-1, H-2, H-3, H-4, H-5".

(Testimony of Delesforo Cadiente.)

(The photographs referred to were received in evidence as Libelant's Exhibits "H-1, H-2, H-3, H-4, H-5".)

By Mr. Greenstein:

Q. When was the last time you saw the boat, Mr. Cadiente?      A. December 2nd.

Q. Were any photographs taken on that day?

A. Yes, there was.

The Court: Tell me what exhibit this is. I'd like to have this Exhibit "E" explained as to what position that was taken from and what it shows.

Mr. Greenstein: I show you Libelant's Exhibit "E" and ask you to tell the Court how, first, the picture was taken?

The Court: Where from, from the top of the house?

Mr. Greenstein: What does it show, if you know?

The Witness: The top of where the man is standing shows the back of the boat, when it was hung up by the crane there. This is the whole bottom of the boat. That is where the keel and frame are.

The Court: Oh, so it is lifted high up enough so that you took it at this angle?

The Witness: Yes.

Mr. Greenstein: And pictures were taken on the "Miss Philippine," you say, in December?

The Witness: December 2nd.

Mr. Greenstein: And where was the "Miss Philippine" then?

(Testimony of Delesforo Cadiante.)

The Witness: Somebody's back yard at Kaunakakai.

Mr. Greenstein: I'd like to offer these into evidence, if the Court please.

Mr. Waddoups: Objected to, your Honor, on the grounds that it is too far remote from the injury, the damage complained [55] of. The evidence is that a great deal of damage was done to the vessel in progressing in the water and transporting her into somebody's back yard. That he mentioned. And further, that they had taken the engine out. And these pictures can give the Court no assistance whatever in determining the question of whether or not on June 6th when this boat ran into the ground she was salvagable within the meaning of the policy in question. I don't see how pictures taken December 6th or December 2nd can possibly help the Court in determining the issue. We submit that they are incompetent, irrelevant and immaterial.

Mr. Greenstein: If the Court please, we should like to contend that the condition of the boat is always material. The controlling factor is not necessary as to the immediate time of the running aground. If, for example, in connection with the tow the boat had gone under, that would be a total loss. I think this Court has a right to consider the condition as of the last date that is available to the Court, because whether or not either the assured or the insurer was correct in either abandoning or not abandoning, or in either going forward or not going for-

(Testimony of Delesforo Cadiente.)

ward in attempting to repair, can be translated in terms of what the final condition of the boat is. The fact that this boat is presently in somebody's back yard we maintain is very material to the original abandonment of the original owner of the boat, substantiates [56] his position all the way throughout. Here we have a boat that was abandoned as not being worthy of repair, and we finally find a boat in somebody's back yard just rotting away.

Mr. Waddoups: Well, if your Honor will look at the insurance policy and particularly to the sue and labor clause contained in the insurance policy, I think it will become obvious to the Court that the question of whether or not this claimant, the Libelant, is entitled to recover, is whether or not at the time it went aground that boat was in a position to be salvagable within the cost limits set forth in the policy, namely, \$21,500. And there is also an obligation in that policy to sue and labor on behalf of the insurance company and himself to diminish damages. The cases are clear that that is the duty of the insurer.

Now, in determining whether or not the sue and labor clause can be invoked in this case, your Honor, we have to fix the time when the question as to whether or not it was salvagable arose. And that was when he first got notice of the boat's condition, that it was aground. It is to that period of time that we must address ourselves in determining this case. And what some other people did with the boat in the course of the next six months would certainly not

(Testimony of Delesforo Cadiente.)

control his right to recover or not recover under this policy.

Mr. Greenstein: With reference to that, before your [58] Honor rules on that, I should like to point out that at the close of the case we expect to file a memorandum of authorities which is slightly at variance with the points contended by Mr. Wad-doups. We maintain that either the party had a duty in whether—if this man thinks it cannot be repaired for a certain value, the best way the insurance company could prove that he was wrong is by going ahead to repair it and say we repaired it for less value than is set forth in the insurance.

We will also have some authorities with reference to the position of the insurance company once it takes control. And the United States Supreme Court has said in cases of this type that once the insurance company starts these operations and takes it from the control of the shipowner, they cannot give it back unless they give it back to him in repaired condition, which has not been done. That is very material, very material as to the present condition of that boat.

The Court: I can't see the materiality of the last photographs offered.

Mr. Greenstein: May we note an exception, if the Court please? Would this be a convenient time for your Honor to recess?

The Court: Yes.

Mr. Greenstein: There is one more point. We are going [58] a little faster than I anticipated.



(Testimony of Delesforo Cadiente.)

My next witness will need an interpreter. I can't get him at 1:30, in which I thought I would. Is there any objection to going on tomorrow morning?

Mr. Waddoups: No, I have no objection. Mr. Gallagher, who will be one of the two witnesses we will call, will not return from the Island of Maui until this afternoon, and he will be available tomorrow morning.

The Court: Well, how many more witnesses are there?

Mr. Greenstein: Just one more.

The Court: When can you have him?

Mr. Greenstein: The first thing in the morning.

The Court: Well, this witness here, he will be under examination for some time?

Mr. Greenstein: Well, I have no quarrel with going forward. I wanted the Court to know now that my position is that I am almost through with this man and I cannot go forward with my next witness until I can get an interpreter. And I am informed that the district court can't let me have one until tomorrow morning. Do you think it is worthwhile to go ahead?

Mr. Waddoups: Well, I think we can complete it tomorrow.

Mr. Greenstein: We can complete the case tomorrow.

The Court: Well, all right, then, at your suggestion this is continued until 9:30 tomorrow morning. (The Court recessed at 11:38 a. m.) [59]

January 17, 1950

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente vs. Indemnity Marine Assurance Co., for further trial.

Mr. Greenstein: I would like to offer into evidence at this time a letter in behalf of the Libellant, making demand for payment, a copy of the letter with a return receipt. We don't need that, I guess.

Mr. Waddoups: No objection.

Mr. Greenstein: And also the letter received in response.

Mr. Waddoups: In connection with the document last offered and to which we said there was no objection, it may be clear while we have no objection to the document's being admitted in evidence, we do not admit the truth of the statements contained in said document.

The Clerk: That will be Libellant's Exhibit I.

(Thereupon, the document above referred to was received in evidence as Libellant's Exhibit I.)

LIBELANT'S EXHIBIT I

June 14, 1949

The Indemnity Marine Assurance Company, Ltd.  
c/o The Bonding and Insurance Agency, Ltd.  
848 Fort Street  
Honolulu, T. H.

Re: Policy No. 11 SFH 10562—  
Sampan MISS PHILIPPINE

Gentlemen:

Demand is hereby made upon you to pay the sum of \$10,500.00 in accordance with the terms of the above captioned marine insurance policy.

You are advised that said sampan, so insured, is a total loss due to stranding, within the meaning and coverage of said policy.

You are again notified that said total loss occurred on or about June 6, 1949, at or near Kaupo, Mana, Maui, and that said vessel has been abandoned by the assured.

Very truly yours,

HYMAN M. GREENSTEIN,  
Attorney for assured  
Fulgencia D. Cadiente

HMG:rp

registered mail, return receipt requested.

cc: Robertson, Castle & Anthony (Mr. Waddoups)

Admitted January 17, 1950.

Mr. Greenstein: And a letter received from Mr. Waddoups in response to my letter.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit J.

(Thereupon, the document above referred to was received in evidence as Libelant's Exhibit J.) [60]

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LIBELANT'S EXHIBIT J

ROBERTSON, CASTLE & ANTHONY

Attorneys at Law

312 Castle & Cooke Building

Honolulu 1, Hawaii

June 17, 1949

Mr. Hyman M. Greenstein  
Merchandise Mart Building  
Honolulu, T. H.

Re: Policy No. 11 SFH 10562—  
Sampan MISS PHILIPPINE

Dear Sir:

In response to your letter of June 14 addressed to Indemnity Marine Assurance Company, Ltd., we wish to advise you that liability under the policy is denied.

It is clear to us that this loss is not a constructive total loss. For your information, the vessel in ques-

tion is tied up, keel down, in a righted position, at the Kaunakakai pier, and its owner is still your client. Our client will not assume responsibility for the disposition of said craft.

Very truly yours,

THOMAS M. WADDOUPS.

TMW:GB

Admitted January 17, 1950.

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Mr. Greenstein: I would also like to offer into evidence a release signed by the boat builder, who was the second party made payable under the loss payable clause of the insurance policy. This is also signed across the face of the policy.

The Court: Who is that?

Mr. Greenstein: Tanimura of the Kewalo Shipyards. There is a loss payable clause made both to the bank and boat builder, and we have had the bank testify as to the relinquishment of their rights.

Mr. Waddoups: No objection.

The Clerk: Libelant's Exhibit K.

The Court: All right.

(Thereupon, the document above referred to was received in evidence as Libelant's Exhibit K.)

Mr. Greenstein: Will you resume the stand, Mr. Cadiente.

## DELESFORO B. CADIENTE

resumed the stand and testified further as follows:  
The Court: Sit down.

## (Direct Examination)

By Mr. Greenstein:

Q. Now, Mr. Cadiente, when was it that you went to Kaupo, Maui, to view the "Miss Philippine"?

A. June 7. [61]

Q. And whom did you go with?

A. I go with Mr. Hagood.

Q. Now, where was the "Miss Philippine"?

A. She was at the reef off Hana, Maui.

Q. How far was she from the shore, if you know?

A. Well, when I reach over in the afternoon, half of the body of the boat was flooded with water, that means right in the reef there.

Q. Were you able to go out to board the vessel?

A. Not that afternoon, sir.

Q. Did you at any time go aboard the "Miss Philippine"?

A. Yes, the next morning, that is Tuesday 8th—I mean, Wednesday, June 8.

Q. The following morning? A. yes, sir.

Q. Did you observe the condition of the "Miss Philippine" when you went aboard?

A. Yes, sir.

Q. Will you describe for the Court just what you

(Testimony of Delesforo B. Cadiente.)

saw and observed with respect to the condition of the vessel?

A. Between 6 and 7 when—June 8, that is Wednesday, I went aboard the boat, “Miss Philippine,” and I observed the condition of the boat, that it was badly damaged.

Q. Can you describe just where it was damaged?

A. The bottom of the boat was completely wrecked [62] except a little bit left of the keel.

Mr. Waddoups: May I have that last, please?

(Answer read.)

Q. (By Mr. Greenstein): Now, you testified yesterday that you also saw the boat later at Molokai, later in the month.

A. Yes, sir.

Q. And we introduced into evidence pictures of the bottom of the boat.

A. Well—

Q. Let me ask you a question. Can you tell us about the condition of the bottom of the boat as compared to what you saw later at Molokai with respect to which we do have a photograph.

A. It was not much—

Mr. Waddoups: Object to that, your Honor, on the ground that the controlling time is the condition of the vessel before the salvage operation started.

The Court: It is overruled because it is simply asking whether it was the same at the later date as it was when he saw it at the beginning.

Mr. Waddoups: Very well.

(Testimony of Delesforo B. Cadiente.)

A. It was not much different when the first time at Kaunakakai, Molokai, sir. [63]

Q. (By Mr. Greenstein): When was it that you ordered the crew of the "Miss Philippine" to return to Honolulu?

A. About 12 o'clock noon of June 8.

Q. And why did you tell them to return to Honolulu?

A. Because after observing the condition of the boat, I have in mind to abandon the boat.

Q. And why was it that you abandoned the vessel then? A. Because—

Mr. Waddoups: Objected to as incompetent, irrelevant, and immaterial, your Honor, calling for a conclusion of this witness, who is not qualified as an expert.

The Court: Overruled.

Q. (By Mr. Greenstein): Why did you abandon the boat?

A. Because after observing the condition of the boat, it is hopeless for me to bring it to Honolulu any more where we can only get a shipyard to fix the boat, and I don't think we can bring the boat back to Honolulu.

Mr. Waddoups: Move to strike the last part of the answer: "I don't think," your Honor, because this man is not qualified as an expert.

The Court: He has given his reasons as to why he withdrew the crew and abandoned the boat.



(Testimony of Delesforo B. Cadiente.)

Q. (By Mr. Greenstein): Did you notify anybody of your abandoning of the boat?

A. Yes, sir, I 'phoned up the Coast Guard at Honolulu. [64]

Q. What did you instruct them to do?

A. I ask them to transfer the message to King, Limited, to tell them not to come to Hana any more because I am abandoning the boat.

Q. Did you make any communication of your abandonment to the insurance company?

A. I think that King, Limited, did, because when I reach over here the next day, I already receive a letter from Mr. Matthew.

The Court: Who is that? I don't get that.

Mr. Waddoups: Let the record show that is Matthew of the Bonding and Insurance Agency.

The Court: Agent for the insurance company?

Mr. Waddoups: Yes, your Honor, we admit that Mr. Matthew is an agent for the defendant.

The Court: And the testimony is that you notified him, or what?

The Witness: I never notified him, but after I come back from Molokai, I receive a letter from him to appear in his office.

The Court: Yes.

The Witness: To sign a note in front of him.

The Court: That is what day?

Mr. Greenstein: I am going to offer this into evidence, if the Court please. [65]

(Testimony of Delesforo B. Cadiente.)

Q. (By Mr. Greenstein): Is this the letter you later received from the insurance company?

A. Yes, sir, this is the one.

Mr. Greenstein: I would like to offer this letter, written by Mr. Matthew of the Bonding and Insurance Agency, the agent for the respondent insurance company.

Mr. Waddoups: No objection.

Mr. Greenstein: Your witness.

The Clerk: Libelant's Exhibit L.

(Thereupon, the document above referred to was received in evidence as Libelant's Exhibit L.)

(Testimony of Delesforo B. Cadiente.)

LIBELANT'S EXHIBIT L

The Bonding and Insurance Agency, Ltd.  
General Agents—Territory of Hawaii

United States Fidelity and Guaranty Company  
848 Fort Street  
Honolulu 2, T. H.

June 9, 1949

Mr. Fulgencia D. Cadiente  
P. O. Box 303  
Ewa, Oahu, T. H.

Dear Sir:

Re.: Indemnity Marine Assurance Company,  
Ltd.  
Policy No. 11 SFH 10562—Sampan  
“Miss Philippine”

You have advised that the above vessel stranded at or near Pauhana, Maui, on the morning of June 6, 1949.

We accordingly hereby make demand upon you to proceed with the salvaging of this vessel in accordance with conditions of the above policy.

Yours very truly,

THE BONDING AND INSURANCE AGENCY, LTD.

/s/ A. H. MATTHEW,  
Office Manager.

AHM:h

Admitted January 17, 1950.

(Testimony of Delesforo B. Cadiente.)

Mr. Greenstein: Your witness, Mr. Waddoups.

The Court: Just a minute. Let me examine this.

You received this letter when?

The Witness: After I come back from——

The Court: Yes, but when was that?

The Witness: Two days after I come back I receive it.

The Court: When did you come back?

The Witness: Wednesday afternoon.

The Court: What day of the month would that be?

The Witness: June 8.

The Court: June 8 you came back?

The Witness: Yes.

The Court: Back to Honolulu? [66]

The Witness: Yes.

The Court: And two days after that would be on the 10th you received this letter?

The Witness: Yes, two days.

The Court: All right. You may proceed.

Cross-Examination

By Mr. Waddoups:

Q. Referring to the letter in question, dated June 9 and bearing Libelant's Exhibit No. 1, was that delivered to you, or did it come to you through the mail?      A. Through the mail.

Q. And was that at home when you got back from Maui?      A. It was in the post office.

Q. You picked it up at your post-office box?

A. Yes.

Q. And was that the day after you got back, or two days after, do you know?

(Testimony of Delesforo B. Cadiente.)

A. Two days after I got back.

Q. So you got back on Wednesday the 8th and you received that letter on the 10th; is that correct?

A. In the evening.

Q. What? A. In the afternoon, yes.

Q. Mr. Cadiente, you have another job besides managing your wife's boat, haven't you?

A. Yes, I do. [67]

Q. What do you do?

A. Special police of the plantation.

Q. And where are you a special police?

A. Ewa plantation.

Q. What plantation? A. Ewa plantation.

Q. Ewa. And is that a full-time job?

A. Yes, sir.

Q. And you just help your wife out; she is the one who owns the boats, but you are her agent and take care of them; is that right?

A. That's right.

Q. And do you direct the operations of these boats? A. Yes, I do.

Q. Do you do any actual fishing yourself?

A. No, I don't do any actual fishing myself.

Q. You don't go out and run the boats yourself?

A. No.

Q. You leave that, in this case, up to Morton?

A. The skipper, yes.

Q. Do you hire the crew or does he hire?

A. Well, she hires.

Q. You just pay the bills?

(Testimony of Delesforo B. Cadiente.)

A That's right.

Q. And make any profit you can out of the fish they [68] bring in; is that correct? A. Yes.

Q. So you don't hold yourself out as a seaman?

A. No.

Q. Mr. Cadiente, you have testified that you went over with Mr. Hagood. A. Yes.

Q. So was that the first time you saw the vessel after it had grounded? A. Yes, sir.

Q. And at that time did Mr. Hagood make an examination of the vessel?

A. No, sir, he never did.

Q. Did he just fly around it?

A. Just fly around it.

Q. Never came down? A. No.

Q. And as a result of your investigation did you direct him to start salvaging operations at one time?

A. No, I never did.

The Court: I understand now that he went over with Hagood.

Mr. Waddoups: That is where his testimony is a little confused, your Honor. I will try to develop that.

Q. (By Mr. Waddoups) Did you go with Hagood or did you [69] go by yourself?

A. No, he requested me—he requested me to come with him, that he wanted to come with me and see the boat.

Q. Had you approached King, Limited, to have the boat salvaged?

(Testimony of Delesforo B. Cadiente.)

A. No, I never make any agreement with them.

Q. How did it happen that Mr. Hagood got in touch with you, Mr. Cadiente?

A. This man that went with me — the Coast Guard, these men went and talked to Mr. Hagood and Mr. Hagood come to me and asked me, “Do you want to salvage your boat?” I told him, “I don’t know what to say because I never see the condition of the boat.”

Then he asked me, “Can you pay my fare so I go with you to Molokai?” So, “All right,” because I was interested. So I bought his ticket, I bought my ticket, we went together.

Q. And that was on what day? The 7th?

A. June 7, yes.

Q. In the morning?

A. About noon, sir.

Q. And did you go down to where the boat was?

A. I went myself.

Q. And Mr. Hagood flew around?

A. Just flew around.

Q. And you testified. [70]

The Court: Wait a minute. I would like to have this a little clearer as we go along. He bought Mr. Hagood’s ticket and they went together to Maui. How did they go?

Q. (By Mr. Waddoups) How did you go to Maui?

A. From the airport I rent another plane.

Q. From what airport?

(Testimony of Delesforo B. Cadiente.)

A. Maui airport.

The Court: How did you get to Maui together, by boat or plane?

The Witness: We went by the big plane, Inter-Island plane.

The Court: What?

The Witness: Inter-Island plane.

The Court: Hawaiian Airlines?

The Witness: Yes, Hawaiian Airlines.

The Court: You went over to Maui and you landed in Maui where?

The Witness: At the airport there at Maui.

The Court: Yes, and then Mr. Hagood hired a plane there?

The Witness: By himself.

The Court: Small plane?

The Witness: Small plane.

The Court: Somebody else piloted it?

The Witness: Yes. [71]

The Court: You didn't go with him in the plane?

The Witness: No, sir. And I hired also another plane.

The Court: You what?

The Witness: I hired also another plane, only me and the driver.

Mr. Greenstein: I think he means an automobile.

The Court: Hagood went in one plane?

The Witness: Yes.



(Testimony of Delesforo B. Cadiente.)

The Court: You hired another plane?

The Witness: Yes.

The Court: You didn't go with Hagood, but you took another plane?

The Witness: I took another plane.

The Court: All right.

Q. (By Mr. Waddoups): On that day did you land at Kaupo?           A. Yes, I did.

Q. Did Hagood land at Kaupo?

A. Hagood landed at Kaupo. It is about two or three miles away from the boat, but when I landed in there, I take another taxi car to go to the boat, but Mr. Hagood after circling by the boat, he went back to the airport and come to Honolulu.

Q. So that Hagood never did get off the plane; is that [72] correct?           A. No.

Q. At that time.

A. By the boat place, but he went down at the small airport at Hana, Maui, far from the boat side.

Q. What we are interested in, Mr. Cadiente, did Mr. Hagood ever inspect that boat on the 7th?

A. No, sir.

Q. From the shore?           A. No, sir.

Q. His only inspection was from the air?

A. Yes.

Q. Is that correct?           A. Yes.

Q. And you inspected it from the shore?

A. Yes, I did.

Q. You went aboard that vessel?

A. I went the next day.

(Testimony of Delesforo B. Cadiente.)

Q. And when you first saw her on the 7th, was she upright?           A. You mean the boat?

Q. Yes.

A. Not exactly upright, but was sinking from the other side of the ocean.

Q. And did you go aboard? [73]

A. I never go in that afternoon. I only stay on the side.

Q. When did you go aboard the first time?

A. It was Wednesday in the morning.

Q. And did you examine the engine or not?

A. Yes, sir, I did.

Q. What was its condition?

A. It was plenty damaged.

Q. What do you mean 'plenty damaged'?

A. The boat below the engine all damaged and the water was slashing through the engine room.

Q. The engine was still intact, wasn't it?

A. Yes, hanging on a big stone.

Q. How about the cabin?

A. The cabin was all open sir.

Q. Was what?

A. The cabin all open and the water was slashing over the cabin.

Q. How about the flying bridge?

A. Damaged, too.

Q. What was damaged to the flying bridge?

A. Well, let's see, well it was dented in the proper position when the boat was in running condition.

(Testimony of Delesforo B. Cadiente.)

Q. Mr. Cadiente, I show you a picture which is marked on the back of it "6/12/49." I ask you to look at that [74] picture and tell us if you recognize what it represents.

A. Yes, this is the nose of the boat.

Q. And was the boat in that same condition, I mean from outward appearance, about the same as that when you saw her on Wednesday the 8th?

A. Yes, sir.

Q. Was she out of water in that manner?

A. Just the nose. Over here water, only this nose over here was on the land between the rocks, between stones.

Mr. Waddoups: We offer this in evidence.

Mr. Greenstein: No objection.

The Clerk: Respondent's Exhibit No. 1.

(Thereupon, the document above referred to was received in evidence as Respondent's Exhibit No. 1.)

Q. (By Mr. Waddoups): I show you another picture that is marked 6/9/49 and ask you to look at that and tell us if that shows an accurate representation of what you saw when you went over there.

A. Yes, sir, this is.

Mr. Greenstein: Pardon me. Is that marked 6/9 or 6/12?

Mr. Waddoups: 6/12, I am sorry. We offer this in evidence.

The Clerk: Respondent's Exhibit No. 2.

(Testimony of Delesforo B. Cadiente.)

(Thereupon, the document above referred to was received in evidence as Respondent's Exhibit No. 2.) [75]

Q. (By Mr. Waddoups): Did you go into the water and examine the hull from underneath?

A. You mean that morning when I went over there?

Q. The first time you examined that vessel on the 8th when you went aboard.

A. Yes, we did. With all the crew.

Q. You went around the vessel?

A. We did.

Q. Could you tell the Court how many planks were broken?

A. I cannot exactly tell you because it was splashing—I mean, the water it was not so clear that we could not get near only that we could see when the water pound the boat up, we could go down quite a way, but could hardly count how many plank.

Q. The ocean was pounding it up and down?

A. Yes.

Q. Is that correct?      A. Yes.

Q. Were you ever there, Mr. Cadiente where—  
Mr. Waddoups: Withdraw that question.

Q. (By Mr. Waddoups): Do you know a man by the name of Mr. Frank Gallagher?

A. I know.

Q. Of the American Shipping Board? [76]

A. Yes, I know.

(Testimony of Delesforo B. Cadiente.)

Q. Were you ever at the scene of that boat when Mr. Gallagher was present?

A. I was not there when he went.

Q. You were never there with Mr. Gallagher?

A. No, I never did.

Mr. Waddoups: I think that is all, your Honor.

Mr. Greenstein: No further questions.

(Witness excused.)

Mr. Greenstein: That is our case, your Honor.

Mr. Waddoups: At this time, if your Honor please, pursuant to the broad powers of equity which the Court sitting in admiralty has, we move at this time that the Court enter an involuntary non-suit against the libelant. The rules of admiralty applicable in this court make no provision for this type of motion, your Honor. I have checked them quite carefully, but the cases are full of ample authority to the effect that the Court sitting in admiralty has broad equitable powers. Rule 41 (b) of the Civil Rules of Procedure, Federal rules of procedure, provides that in civil cases of law and equity the Court may, where a case has not been made out at the end of the plaintiff's case, on motion grant a dismissal. We base this motion, your Honor, on the fact that libelant has utterly failed to comply with the allegations of his complaint. There is absolutely no evidence before your [77] Honor as to (a) the extent of the damage from a monetary point of view and (b) the amount it would cost, or would have cost, to repair that vessel.

(Argument on motion by Counsel, both for the Libelant and Respondent.)

The Court: I don't care for any further argument. The motion is denied.

Mr. Waddoups: If your Honor please, may we have a short recess at this time.

The Court: Yes.

(Recess had.)

Mr. Waddoups: If your Honor please, at this time, as it was indicated to the Court in chambers, we are having a little difficulty in getting attendance of one of our witnesses and request the matter stand over until 10 o'clock tomorrow morning.

Mr. Greenstein: No objection.

The Court: That is agreeable to the Court.

Mr. Greenstein: No objection.

The Court: All right, the matter will stand over then until 10 o'clock tomorrow morning for further proceedings.

(Thereupon, at 10:45 a. m., an adjournment was taken until 10:00 a. m., January 18, 1950.)

January 18, 1950

(The Court convened at 10:00 a. m.)

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente, Libelant, versus The Indemnity Marine Assurance Company, Limited, Respondent, for further trial.

Mr. Waddoups: We are ready to proceed, your Honor. Mr. Gallagher, will you take the witness stand, please?

FRANK HOWARD GALLAGHER

a witness in behalf of the Respondent, being duly sworn, testified as follows:

Direct Examination

By Mr. Waddoups:

Q. Will you state your name, please?

A. Beg pardon?

Q. What is your name, please?

A. Frank Howard Gallagher.

Q. Mr. Gallagher, by whom are you employed?

A. American Bureau of Shipping.

Q. And in what capacity?

A. Marine surveyor.

Q. Does that bureau have an office here in the Territory?      A. Yes. [79]

Q. Where is your office?

A. In the Hawaiian Trust Building.

Q. Will you please tell the Court the nature of the organization of the American Bureau of Shipping and what are its functions?

A. American Bureau of Shipping, it is a classification society primarily. However, here in Honolulu in addition to doing classification work I represent Lloyds, London salvage, United States salvage, and any other foreign classification societies.

Q. Does the American Bureau of Shipping have any governmental connection?

A. As far as insurance is concerned, no. We are, however, licensed by the Department of Commerce

(Testimony of Frank Howard Gallagher.)

through the Treasury Department for the assignment of load lines of vessels.

Q. How long have you been a surveyor, Mr. Gallagher?

A. I have been with the American Bureau for nine years.

Q. And prior to that, what experience, if any, did you have in and about ships?

A. I was on a guarantee staff of the Sun Shipyard in Chester, Pennsylvania. I was also at the Sparrow's Point Bethlehem Shipyard. And prior to that I had ten years' experience at sea.

Q. Do you hold any licenses as a master? [80]

A. I have a chief engineer's license for both steam and diesel, unlimited. I have a professional engineer's license in the nature of naval architect for the State of Washington and the State of Oregon.

Q. And have you studied the matter, the various factors involved in the work as a surveyor?

A. Quite diligently, I believe.

Q. Did you go to school to study that?

A. In this particular case, yes and no. In other words, to get your degree as a naval architect I did not attend Webb or M.I.T. or Michigan. Those are the three leading schools. However, my training had been sufficient, my education has been such that I had passed the examination for both the State of Oregon and the State of Washington.

Q. Mr. Gallagher, on or about June 6th or 7th of



(Testimony of Frank Howard Gallagher.)

this year were your services engaged by the Bonding and Insurance Agency in connection with the stranding of a vessel known as the "Miss Philippine"?

A. That is correct.

Q. And what were you employed to do?

A. I believe, having made a rough reviewal of my report here, I was advised by Bonding and Insurance on the 7th of June to attend the site of the stranded "Miss Philippine" sampan on the coast of Maui. I left Honolulu after having been authorized by them to attend and hold a survey; [81] arrived at the scene of the wreck at approximately six, between six and seven in the evening.

Q. Mr. Gallagher, did you make a written report covering your doings in connection with the "Miss Philippine"?

A. Quite in detail.

Q. Do you have that report there?

A. I have it here.

Q. Would it assist you in refreshing your memory to refer to it?

A. Well, as far as the questions are concerned, yes.

Mr. Waddoups: Do you have any objection to him referring to his report?

Mr. Greenstein: I have no objections. I may want to inspect the report. Do you have a copy?

(Mr. Waddoups hands a document to Mr. Greenstein.)

(Testimony of Frank Howard Gallagher.)

By Mr. Waddoups:

Q. After arriving at the scene, what did you do, at the scene of the vessel?

A. At the time that I arrived at the scene of the vessel she was lying beam to or broadside to the beach.

The Court: What time?

The Witness: At approximately 6:45 p. m., June 7th. If I may be permitted, I think that—is it quite all right to read the report? It is quite short. As far as my particular attendance, the report at that time—— [82]

Mr. Waddoups: Do you have any objection?

Mr. Greenstein: Let him continue. I will move to strike if he is going beyond the scope——

——Mr. Waddoups: Answer it in your own way and Counsel will make such corrections later.

A. (Continuing) Well, the vessel was lying in an approximately easterly-westerly direction, I believe, and it was quite well-beached inasmuch as that with the receding tide the whole underwater portion of the vessel was completely exposed. The condition of the bottom I noted in detail, and that condition is reflected in this report. The condition was such that in my opinion the vessel was completely salvagable.

Mr. Greenstein: That is objected to, if the Court please, as going beyond the scope of any question.

The Court: Yes. You are giving your conclusions there when you were merely asked as to the condition of the vessel.

(Testimony of Frank Howard Gallagher.)

Mr. Waddoups: That is probably my fault, your Honor.

Q. (By Mr. Waddoups): What did you find was the condition of the vessel? You may refer to your report to refresh your memory.

A. The condition at that time on the starboard side, which is the land side, I found the planking with a hole through in the engine compartment, and the area of such hole was approximately three by three, or nine square feet. [83] The planking in the way of the fish compartments, which were aft of the engine compartment, intact but sustaining damage due to the constant rocking of the vessel by the wave action.

On the port side, the opposite side to the position to the shore, the planking in the way of the engine compartment and fish wells, sustaining damage due to constant rocking of vessel by wave motion.

Q. What was the condition of the keel?

A. The keel torn but intact as members, intact as a member.

Q. What do you mean "intact as a member"?

A. The construction of that keel extending inwardly, where your planking makes up to the keel, we have what is known as a rabbit line, and as far as the intactness of that member known as keel it was intact as a keel. However, it was scuffing due to it being lodged in between rocks.

Q. Did you examine any other portion of the vessel?

(Testimony of Frank Howard Gallagher.)

A. Yes, I did.

Q. And what did you find to be its condition?

A. I found the rudder was broken away and the propeller was badly damaged.

Q. Was the propeller still attached?

A. The propeller and shaft was still attached but badly damaged; the stem intact with the exception of the [85] part having sustained damage as the result of constant racking.

Q. What do you mean by racking, Mr. Gallagher?

A. Racking, the motion of the vessel, the physical effect upon the structure of the vessel from the result of motion.

Q. And that motion was caused by what?

A. By the waves, the wave motion.

Q. Did you examine any other portion of the vessel?

A. There was no need to because in my opinion I was there purely to carry out survey and what I did note was the apparent damage.

Q. Did you notice, did you observe the flying bridge and the deck and the upper portion?

A. There was no damage at the time that I attended that vessel above the chines.

Q. And what are the chines?

A. The chines are the angular chines from your side planking leading down to the keel. In other words, the right-angle section of the bottom planking and the side planking.

(Testimony of Frank Howard Gallagher.)

Q. From your experience and background, Mr. Gallagher, did you form an opinion as to the salvagability of that vessel at that time?

A. Yes, I did. [85]

Q. And what was that opinion?

A. My opinion was that the vessel should be immediately salvaged. I base that opinion—if I am permitted I'd like to read my third paragraph—

The Court: Well, perhaps you had better wait until you are asked about that, what you based it on.

A. The vessel was salvagable, in my opinion, due to its position on the shore. The vessel in stranding eased itself up by its own buoyancy and with the receding tide was left lodged in between the rocks. The rocks which I observed at the time were of such nature that they could be moved in order to get the vessel seaward. That was later borne out.

Q. Who was with you, if anyone, at the time you were making this inspection?

A. I attended the vessel alone.

Q. Did you see Mr. Cadiente that day, the first day?

A. I saw no one at Kaupo.

Q. Did you see the vessel later?

A. I saw the vessel on Saturday of that week.

Q. And was anyone with you at that time?

A. Yes, there were many people around the vessel at that time.

Q. Was Mr. Cadiente there?

(Testimony of Frank Howard Gallagher.)

A. Mr. Cadiente, to the best of my knowledge I never [86] saw him at the attendance of the wreck.

Q. And on the second occasion when you attended the vessel, what was done?

A. At the time that I made my second attendance, which was on that Saturday, the "Maizie C" was lying offshore and they were endeavoring to attach a line around the "Miss Philippine" and pull her off.

Q. Did they pull her off?

A. The vessel was pulled off at approximately 2:30 p. m. the following day, which was Sunday.

Q. And did they use any, did they have any mechanical equipment there to assist in dislodging it?

A. Yes, going back to my previous statement about the boulders, I found it was necessary to resort to some mechanical means. Therefore, I engaged a 14-ton tractor from the Kaupo Baldwin Ranch, which was of great assistance in clearing a pathway to get that vessel to sea.

Q. Now, did you observe the condition of the hull of that vessel and the keel on this second occasion, the Saturday when you went on your trip?

A. Yes, that's right, I did. In order to get that vessel out we had to remove the boulders, the small rocks, and so forth, lodged around the keel. As a matter of fact, the only difficulties we experienced was the lodging of rocks around the keel and towards the escape aft. [87]

(Testimony of Frank Howard Gallagher.)

Q. Was the damage at that time greater or less or the same as when you had seen the vessel—

A. There was more damage naturally. I had also calculated that we had—and I later checked into the weather conditions, and they were found to be practically the same from Monday until Saturday—and I found that with the increase of the tide that that vessel would approach the beach a little more. Now, there was about, in my opinion, due to what I will call 600 motions of rack in one day due to the weather conditions, the normal surge of the sea, pushing this vessel 600 motions a day. Those 600 motions from the time of my attendance, which was on Tuesday until Saturday, multiplied by the days, actually increased the damage I would say about 20 percent. The damage, however, was not so much in the nature of complete stoving in but it was the effect of the friction, the rolling of the vessel on to the rocks.

Q. And from your experience, Mr. Gallagher, on the second day of your attendance was that craft salvagable?

A. Yes, sir, it was. You mean on Sunday?

Q. Yes.

A. That would be my third day.

Q. Your third day. Was it salvagable at the time of pulling it off?     A. Yes.

Q. Did you then see the vessel at a later time?

A. I saw the vessel when it was in a capsized condition at Kaunakakai, moored to the Territorial wharf.

(Testimony of Frank Howard Gallagher.)

Q. And was anything done in your presence to right the vessel?

A. I recommended to Mr. Chipchase, who was with me, that the vessel be rotated in the water and brought to an upright position, which was carried out.

Q. And did you observe the condition of the vessel after it had been righted?

A. Yes, there was no damage to the housing structure, of the deck, or to a good portion of the shell.

Q. In your opinion, Mr. Gallagher, in its condition as it was found at Kaunakaki in the righted position, would the cost of repairing or salvage of that vessel exceed twenty-one thousand dollars?

A. The cost, it would be rather from a business—

Mr. Greenstein: Objection to this. This man has not been qualified to testify as to the cost of building vessels or repairing. It is further objected to on the ground that in view of the state of the case in this stage that question is immaterial.

Mr. Waddoups: They have introduced the insurance policy in evidence, your Honor. It is part of their complaint.

The Court: Well, as to the qualifications of the witness as to the cost of construction and repair, you'd have [90] to qualify him.

Mr. Waddoups: Very well, your Honor.

Q. Mr. Gallagher, have you had any experience



(Testimony of Frank Howard Gallagher.)

in connection with your surveying with the cost of salvage?

A. Many, many times.

Q. And on various types of vessels?

A. Many, many jobs.

Q. And over how many years have you been doing it?

A. As far as the occasion of cost is concerned, I would say five years.

Q. And is it a part of your duty as a surveyor to make estimates as to cost of salvage?

A. Not only do I make the estimates but I draw up contracts and engage parties on tender bids to carry out such repairs.

Q. Have you had experience in the cost of repairs to vessels of the type of "Miss Philippine"?

A. Yes, I have.

Q. Are you familiar with the general run of costs in repairing vessels in this Territory?

A. I do that work quite frequently.

Q. Have you any opinion as to whether or not it would have cost more than twenty-one thousand dollars to repair the "Miss Philippine", considering her condition as she laid tied keel down at the dock at Kaunakakai? [90]

Mr. Greenstein: That is objected to on the ground of being highly leading and suggesting a figure to the witness.

Mr. Waddoups: I asked him if he has an opinion.

Mr. Greenstein: Well, I still object to it as being—it is putting words and figures in the wit-

(Testimony of Frank Howard Gallagher.)

ness' mouth. If this man is such a good expert on cost and repairs, let him be asked how much it would cost, not does he think it would cost more than twenty-one thousand dollars, more or less.

The Witness: That's quite all right. Is it all right to answer, your Honor?

Mr. Waddoups: The policy provides that it will not be a total loss unless it costs over twenty-one thousand dollars in repairs. The policy provides for payment only in the event of a constructive total loss. We submit it is a proper question.

The Court: You may, if you made an estimate, as estimates are made of the matter of cost of repair of the boat, you may testify. I don't want just your guess whether it would be more or less than twenty-one thousand dollars, or any other figure. But if you made an estimate, give us your estimate.

A. I did not make an estimate of the damage to the hull or the machinery, for the reason that I was not asked to do so. I was asked to state whether or not that vessel could be salvaged. If I were asked how much would it cost [91] offhand to effect repairs as I saw the vessel in Kaunakakai——

Mr. Greenstein: I object to the rest of it as not being responsive to the question. The witness has already disqualified himself. He has already admitted that he did not make an estimate in the manner that is customarily made in the matter of making customary repairs that would be required. Salvagability is one thing. That is a nebulous con-

(Testimony of Frank Howard Gallagher.)

cept, that nobody worries about the ultimate expense. The man here has testified that he did not make a detailed estimate, so I submit that he is not qualified to give a specific figure.

The Court: Well, I don't know what the objection was.

Mr. Greenstein: Well, the specific objection is that he is not responding to the question. You asked him whether or not he made a detailed estimate, and he said no but if I would have I would have made so and so.

The Court: He hasn't finished his statement.

Mr. Waddoups: What were you going to say, Mr. Gallagher?

The Court: Were you going to say something in response to the question?

The Witness: I was, your Honor. At the time the vessel was at Kaunakakai when I saw it, as far as the hull is concerned, the engine, and the damage to the fish compartments, I would venture to say that the repairs could be effected for about seven thousand dollars.

The Court: Where? [92]

The Witness: At Honolulu.

Q. (By Mr. Waddoups): Have you any estimate as to the amount that the cost of towing it to Honolulu from Kaupo would be? A. Yes.

Q. What would you place that estimate at?

(Testimony of Frank Howard Gallagher.)

A. From Kaupo to Honolulu?

Q. From Kaupo. A. Kaupo?

Q. Kaupo to Honolulu, yes.

A. At the prevailing towing rate of fifty dollars per hour, why, I would say that that vessel could be towed in for perhaps about seven hundred dollars.

Q. Mr. Gallagher, what do you mean when you use the word "salvagable?" What is that word taken to mean in the language of surveyors like yourself?

A. That word, the interpretation of it means that in my opinion the vessel has a sufficient value that it has further use through repair.

Q. Mr. Gallagher, while you were over there, did you take any pictures?

A. I took some still shots as well as a 50-foot reel of 16 mm.

Q. Do you have that 50-foot reel with you here?

A. I do. Yes, I have. [93]

Mr. Waddoups: If your Honor please, may we show it to the Court, these movies that were taken over at Kaupo at the scene of this wreck? If the Court is interested in them, we'd like to present them. I feel they will graphically show what the situation was at that time.

The Court: When were they taken?

The Witness: These pictures were taken on the very same day, within a matter of three hours before the vessel was taken through the water on Sunday of that week.

(Testimony of Frank Howard Gallagher.)

The Court: Well, all they would show — we have got pictures in here of the vessel on the beach there at the extreme low tide apparently, and all that the movies would show is the rocking of the boat in response to the waves as they came over? What was the condition of the tide at the time the pictures were taken?

The Witness: I was just about full, and, if I am correct, I believe the tide started to ebb about 2:00 p. m. that day. I might mention that these pictures are far better than the still shots, as far as bringing out the condition of the vessel.

The Court: Well, have you got your apparatus here?

Mr. Waddoups: Yes, your Honor.

The Court: How long will it take?

The Witness: Three minutes.

The Court: Well, I mean to rig up. [94]

The Witness: Perhaps about two minutes.

Mr. Waddoups: May I suggest a brief recess while we rig it up?

The Court: All right.

(A short recess was taken at 10:30 a. m.)

(Movie shown of the "Miss Philippine")

Mr. Waddoups: If your Honor please, Counsel states he has no objection to the picture, this picture, which I would like to introduce in evidence as Respondent's next exhibit in order.

The Clerk: Respondent's Exhibit No. 3.

(Testimony of Frank Howard Gallagher.)

(The photograph referred to was received in evidence as Respondent's Exhibit No. 3.)

By Mr. Waddoups:

Q. Mr. Gallagher, during the course of your making a survey on the "Miss Philippine" did you have occasion to have any conversation with Mr. Cadiente who sits here?

A. The only time I ever saw Mr. Cadiente before this morning was at the Coast Guard office, I believe, during that week between the 7th and Sunday, whatever that date may be, and I saw him one time on the street in Honolulu. That's all.

Q. As surveyor for the Bonding and Insurance Company and for the defendant corporation in this action, the respondent [95] corporation, were you ever given any notice by Mr. Cadiente of intention to abandon—

Mr. Greenstein: That is objected to, if the Court please. It hasn't been shown that he would be the party to receive the notice anyway.

Mr. Waddoups: It shows that he went there as an agent of the corporation.

Mr. Greenstein: I will admit that.

The Court: I think that should be sustained. I don't know, I can't see that there would be any occasion for him. He is a surveyor.

Mr. Waddoups: Very well. You may cross-examine.

(Testimony of Frank Howard Gallagher.)

Cross-Examination

By Mr. Greenstein:

Q. Mr. Gallagher, you are familiar with the Hawaiian waters, I take it, the waters around the islands?

A. What do you mean by familiar with them?

Q. Are you familiar with the waters? Aren't you able to answer that question?

A. I would be familiar with waters only after I had consulted a chart.

Q. How long have you been out in Honolulu?

A. I have been in Honolulu one year.

Q. And do I take it, then, you are not familiar with the waters between Honolulu and Kaupo? [96]

A. As far as depths are concerned, no. I believe that anyone would always refer to a chart.

Q. Well, now, when you said that in your opinion the boat was salvagable at Kaupo, I take it that your opinion envisioned the towing of the boat to Honolulu, did it not?

A. That is correct.

Q. So that one of the factors could well be the waters in the route which would obtain between Kaupo and Honolulu?

A. In my opinion the vessel was considered satisfactory for the tow to the Port of Honolulu.

Q. Now, are you familiar with the route that was actually taken?

A. I am not familiar, no, I am not familiar with it, no.

(Testimony of Frank Howard Gallagher.)

Q. Well, you know it left Kaupo? You were there when the boat was floated?

A. Yes, I was.

Q. And you saw the boat when it was tied up at Kaunakakai? A. That is correct.

Q. So the boat—— A. That is right.

Q. ——there is a red mark here (Referring to map) A. That is right.

Q. Now, I ask you whether you are familiar with the [97] nature of the waters along the route indicated here by my pencil from Kaupo to Kaunakakai, that is, from the standpoint of whether the waters are rough or smooth, generally speaking?

A. If you would ask me——no.

Q. You are not familiar with that?

A. That is right.

Q. Isn't that a factor to be considered in connection with whether or not you think a boat could be towed from Kaupo to Honolulu, the nature of the waters to be covered?

A. The engagement of the salvager, King Freight, Incorporated, that was their responsibility to deliver that vessel to Honolulu.

Q. Yes. And they didn't go to Honolulu, did they?

A. For reasons perhaps which are none of my concern the vessel did not arrive in Honolulu.

Q. Now, in making your opinion and conclusion that the boat could be towed from Kaupo to Honolulu, did you consider the contingency that the boat might capsize?



(Testimony of Frank Howard Gallagher.)

A. I was interested in extracting the vessel from its location.

Q. That's correct. Now, did you consider the possibility that the boat would capsize in the water as it was going along?

A. That is the responsibility of the salvor in every case. [98]

Q. Are you having difficulty in answering my questions directly, Mr. Gallagher?

A. No, I am not, Mr. Greenstein. I am simply applying my position in the matter. I was engaged as an extractor.

Q. Yes, you were engaged by the Respondent here and you have been able to answer the questions on direct very nicely. Now, I am asking you and you had three times stated at three different locations here that the boat was salvagable. I am asking you that when you made up your mind whether you considered, as an expert, the possibility of the boat being capsized as it was in the process of being towed? Now, did you consider that factor or not?

A. The condition of the vessel, in my opinion, was such that stability would have been maintained.

Q. Well, now you are an expert in marine matters. You are familiar with the term "capsize". You are familiar with the term "towing bottom side up."

A. That's right.

Q. I ask you the third time whether you considered that factor at all, that possibility, yes or no?

A. I had faith in the concern doing the towing to

(Testimony of Frank Howard Gallagher)

consider such a condition. At the time they carried out what I thought was quite normal precautions. They installed flotation bags. It was quite understandable why the vessel should have a port list, as indicated in the film you have [99] just witnessed.

Q. You are going beyond my question. Do you mind just trying to answer my questions? I take it you did not then consider the possibility of the boat capsizing in water along the tow.

A. That was—what I am trying to state.

Q. I take it you cannot answer that question yes or no, then?

A. It is faith in other people that I had.

Q. We will move on to the next point, then, which makes a difference in your opinion as to whether or not that boat could be towed to Honolulu, the fact that the boat turned over. Would that make a difference?

A. Why the vessel turned over, I do not know.

Q. I didn't ask you why. I say, does that factor make a difference; towing the boat upright is one thing and bottom side up is another, is it not?

A. I should think that the effects of such a cap-sized tow of the vessel would be quite serious, yes indeed.

Q. Would it change the speed?

A. Considerably so, yes.

Q. Would it increase the hazards of completely effectuating the tow with the respect to the towing vessel?

(Testimony of Frank Howard Gallagher)

A. Would you repeat that, please?

Q. I will withdraw that and reframe it. Does it increase the possibility of the vessel being towed breaking up in water?

A. What do you mean by the vessel?

Q. Well, now, you are the expert. Let's leave that question alone. You were sent out there to survey the vessel, the "Miss Philippine." You are concerned with the salvagability of that vessel. When I am talking about the vessel, I am talking about the "Miss Philippine". Now, you say that could be towed from Kaupo to Honolulu?

A. That's right.

Q. Now, Honolulu is the place this vessel is to be towed?

A. That's right.

Q. Because that's where the repair facilities are?

A. Correct.

Q. When you examined her, she looked pretty good?

A. That's correct.

Q. When she was brought afloat, you do know that she turned over?

A. That's right.

Q. And I put it to you, whether or not that factor of the vessel capsizing would make a difference in the possibility of it being possible to tow the boat to Honolulu?

A. The condition of the bottom was not changed due to the capsized position of tow. [101]

(Testimony of Frank Howard Gallagher)

Q. Would you mind trying to answer a question directly? A. The housing——

Q. No, no, no. Just a minute, now. You are an expert in marine matters. The problem is to get the "Miss Philippine" to Honolulu. Right?

A. That is correct.

Q. I put it to you, that the fact that the boat capsized is a factor to be considered. Right? Yes or no? A. Yes, of course.

Q. Because in the first place it will slow the vessel down, slow the boat? A. Yes, naturally.

Q. And if the vessel breaks up, there is a hazard to the towing vessel. Right?

A. Not necessarily.

Q. Not necessarily? That is not a hazard?

A. Not necessarily.

Q. Now, I take it you don't know the character of the waters between Molokai and Oahu?

A. Well, I fished in those waters and that was the only extent.

Q. And you are an expert out here on——

A. On the application——

Q. ——in the Territory of Hawaii, and you don't know that it is public knowledge that the regions between Molokai [102] and Oahu are very rough as compared to this route? Can you tell us that you do not know that?

A. Those waters between Oahu and Molokai are known to be quite rough.

Q. Yes, they are. Well, that is admitted, because the Court knows it anyway. Now, considering the

(Testimony of Frank Howard Gallagher)

route between Kaupo and Honolulu, I ask you again whether it would make any difference in the ultimate objective to bring the "Miss Philippine" to Honolulu: One, the state of the condition of the "Miss Philippine" being capsized, in a capsized condition, and the rougher water between Molokai and Honolulu?

A. May I make this clear, Mr. Greenstein? My position—I was engaged solely to extract the vessel. That's all.

Q. Yes, and in the process of extracting it was your recommendation and your opinion of salvagability which projected the attempt to remove the vessel from Kaupo to Honolulu. That was your recommendation, was it not?

A. That is correct.

Q. And do you mean to say you did not consider the relative roughness of the waters in making that recommendation?

A. I know of many, many cases where vessels have been towed from Alaskan waters, having been up there.

Q. My question was, did you consider that or not? [103]

A. That is entirely the responsibility of the salvor.

Q. I take it you didn't then. Now, why is it that you can't answer—let me ask this question again—in your opinion now, as an expert, knowing the condition of the boat as you now know it, do you

(Testimony of Frank Howard Gallagher)

have an opinion as to whether or not that boat could actually cross the Molokai straits?

A. Oh, yes, I think it could.

Q. In tow? A. Yes.

Q. But it wasn't towed across there, was it?

A. It was not towed across, that is correct.

Q. And when you are talking about salvagability of the "Miss Philippine," you are talking about repairing it after you get to Honolulu—right?

A. The reason that Honolulu was thought of was because repairs can be effected a lot cheaper here than they can in the other islands.

Q. And let's go back now to the scene of the wreck. A shipowner has a right to consider where that boat has to go in order to effectuate the repairs, has he not? That is a factor? He also has the right to consider the question of the boat being on the beach and being racked, as you testified. That is a factor?

A. As far as he is concerned, yes.

Q. And if the boat is to be towed to Honolulu, there [104] is a time factor of bringing a tug out and then the flotation movement. Those are all factors to be considered? A. Yes.

Q. Now, when you said the boat was being racked 600 times a day, you weren't watching it, clocking the boat, were you?

A. I ascertained such movement by practical timing, yes.

Q. Do you know how many seconds there are in a day?

(Testimony of Frank Howard Gallagher)

A. There's 1440 minutes in a day. Multiplied by 60 will be the seconds.

Q. And are you trying to tell me the racking was less than one a minute?

A. The racking was less than one a minute.

Q. Yes.

A. At that time, yes, because there's many, many portions of coastline where you can have a vessel practically up to the edge of the water and you will have no racking.

Q. Was this a continuous film when we saw the racking?

A. This film was taken at one time.

Q. At one time?

A. That is correct.

Q. The racking that shows there, there were several racking motions per minute, which would enlarge the number of rackings that you have testified about. [105]

A. I doubt that, Mr. Greenstein.

Q. Well, let's leave it alone. Of course, the winds could be stronger, too?

A. That is correct.

Q. Now, actually that boat until it is taken off the rocks is at the mercy of the elements—right?

A. Definitely so.

Q. The mercy of the winds, the racking and the stones?

A. Absolutely.

Q. Now, as a surveyor, for example, you could have recommended that the boat merely be picked up and retained on shore, could you not?

A. Perhaps that could have been carried out.

(Testimony of Frank Howard Gallagher)

However, there was quite an incline. And then, of course, at that remote location facilities were very minimum.

Q. So actually the practical solution was to have the removal of the boat to Honolulu? A. Yes.

Mr. Greenstein: Thank you. No further questions.

The court: Where were you when the boat turned turtle?

The Witness: I imagine I was back in Honolulu.

The Court: You weren't there?

The Witness: No, sir. I left the scene at the conclusion of that picture when she was drawn to sea. I had to get a certain plane that night, the last plane, as a matter [106] of fact, six o'clock.

The Court: Well, she was under way and in tow when you left?

The Witness: That is right.

The Court: Where were you when the air bags were put in?

The Witness: I was at the scene.

The Court: Now, you mentioned two or three times "we did this," so and so, indicating to my mind that you were participating in the removal of the boat from the beach.

The Witness: My appliance of the term "we" had reference to the fact that I engaged a tractor and I believe also ten men to assist the men that you saw working around the vessel.

The Court: Did you take a hand by directions



(Testimony of Frank Howard Gallagher)  
and instructions and suggestions in the placing of these air bags in the boat and securing them?

The Witness: I was consulted about where the bags were placed.

The Court: How much does that vessel draw normally when she is at sea?

The Witness: I would say normally that the "Miss Philippine" would probably draw about five meet of water.

The Court: About five feet? And from the deck to her keel what is the depth? [107]

The Witness: No measurements were taken, but I would say her depth would be about seven.

The Court: Well, you mean that when she is at sea that her deck is only two feet above water, above the water line?

The Witness: If she was iced up and full, water aboard, and so forth, I would say that her extreme draft would be somewhat in the vicinity of five feet, considering the speed of that vessel was quite speedy, too.

The Court: The superstructure on her, what did it consist of?

The Witness: Actually, your Honor, there is no superstructure on that particular type of construction. She has purely a deck house. The deck house inward from the bulwark consisted of the usual sampan arrangements such as sleeping accommodations, master, pilot's, and also above that, why, she had a canvas-covered open bridge.

The Court: Where were the fish boxes?

(Testimony of Frank Howard Gallagher)

The Witness: Aft of the deck house.

The Court: Below deck?

The Witness: That's correct.

The Court: Where was the engine located?

The Witness: Below the deck house.

The Court: About how far?

The Witness: Midship of the vessel.

The Court: What was the length of the boat? [108]

The Witness: I do not believe I have those dimensions here. I may have.

The Court: Do you have the beam?

The Witness: No, those dimensions are not in my report.

The Court: Now, you saw the boat over in Maui. I mean at Molokai.

The Witness: Kaunakakai, yes, sir.

The Court: How many days later was that?

The Witness: I attended the "Miss Philippine" at Kaunakakai on June 14th, which was a week later.

The Court: She had been righted then?

The Witness: No, sir, she was not. She was in a capsized condition when I saw her at the Territorial wharf.

The Court: You didn't see her after she had been righted?

The Witness: Yes, I did, sir. I was the one that recommended the vessel be rotated and righted and left in an upright position.

The Court: Would it have been practically

(Testimony of Frank Howard Gallagher)

feasible to have righted her at sea, in your opinion?

The Witness: That, of course—well, let's put it like this: with the equipment that was towing the "Miss Philippine" I seriously doubt if they could right that vessel at sea.

The Court: Well, in the absence of a large vessel with [109] an overreaching boom you couldn't have done it with any other equipment, could you? Do you suppose that if there would have been two tugs the size of the "Maizie C" there—

The Witness: In the event that there was two tugs, why, I believe that rotation could have been accomplished because it was rotated in the matter of a very few minutes at Kaunakakai.

The Court: Well, that is perfectly still water.

The Witness: That is right, yes, sir.

The Court: In the lee of any wind.

The Witness: That's right.

The Court: Have you got any questions?

Mr. Waddoups: I have one or two more questions, your Honor.

### Redirect Examination

By Mr. Waddoups:

Q. Mr. Gallagher, in the process of rotating this vessel at Kaunakakai, what equipment was used?

A. I believe we used a 2-inch manila line, and that line was wrapped around the girth of the vessel. The C.P.C. crane on the wharf was brought to the "Miss Philippine." The boom extended, the hook dropped, and the manila line wrapped around the

(Testimony of Frank Howard Gallagher)

vessel. It was made into a bit, hooked into the hook and the boom slowly rotated her into the upright position. [110]

Q. Was any damage done to her hull in the process of doing that?           A. No.

Q. Nothing biting into the hull at any point, was there? Merely rope around it?

A. No. That's one reason we used the manila. We did not use a wire.

Q. In your opinion, was it practically feasible to make repairs to the "Miss Philippine" at Kaunakakai and then bring her to Honolulu for further repairs?

A. Well, I believe that, what we call salvage patches, could have been installed to the bottom of the "Miss Philippine" and the vessel pumped out, and as an extra precaution flotation bags could have been fitted into the hull.

Q. And what do you think of the feasibility with the equipment at Kaunakakai of placing that vessel on a barge and bringing her to Honolulu in that manner?

A. That I believe could have been carried out, yes.

Mr. Waddoups: I think that's all.

Mr. Greenstein: Just one question, if I may.

#### Recross-Examination

By Mr. Greenstein:

Q. Mr. Gallagher you are the Mr. Gallagher that is referred to in the charter agreement between the

(Testimony of Frank Howard Gallagher)

Indemnity Marine Insurance Company and King Limited, "Maizie C"? [111]

A. Yes, I am the only person by that name in this——

Q. In other words, "The said vessel Maizie C shall get underway from Honolulu on or about June 10th, 1949, and proceed to Kaupo, Maui, and there control of said vessel shall pass to Mr. Gallagher, American Bureau of Shipping Surveyor . . ." You are the Mr. Gallagher?      A. That is correct.

Mr. Greenstein: I have no further questions.

The Court: Well, after you arrived at Kaunakakai, why didn't you bring her to Honolulu?

The Witness: I went to Kaunakakai primarily to note the condition of the "Miss Philippine." Such condition was reported to the insurance company agent in my report. From then on I was not directed to carry out any further survey. The vessel remained at the wharf at Kaunakakai, and the matter closed as far as I was concerned.

The Court: You didn't make any report after you had gone over and righted the vessel, examined her first and then righted her; you didn't make any report to the principal?

The Witness: I stated my attendance at Kaunakakai; also stated that the vessel was rotated and placed upright, keel down; and the buoyant vessel was then left at the Territorial wharf.

The Court: And that was the end of it?

The Witness: That is true, sir. [112]

The Court: Well, in righting her you are quite

(Testimony of Frank Howard Gallagher)  
sure that her walls weren't crushed by the weight, the pressure of your hawser around her?

The Witness: Yes, I feel certain.

The Court: There has been some testimony here that after she was taken out of the water at Kaunakakai that there was an additional damage.

The Witness: That could readily be, your Honor, in the method employed in removing that vessel from the water.

The Court: Well, do you know what method was employed?

The Witness: No. I knew nothing of the vessel except through hearsay, that the vessel was actually removed from the water at Kaunakakai.

The Court: Do you know upon whose authority or instructions she was removed?

The Witness: No, sir, I do not.

The Court: That's all a closed book to you after?

The Witness: After I left Kaunakakai my interest in the matter ceased.

The Court: You don't know who took charge from there?

The Witness: No, sir, I do not.

The Court: All right.

Mr. Waddoups: I have no further questions.

Mr. Greenstein: No further questions.

Mr. Waddoups: You may step down, Mr. Gallagher. [113]

(Witness excused.)

Mr. Waddoups: Mr. Chipchase, will you take the stand, please?

CALVERT GRAHAM CHIPCHASE

a witness in behalf of the Respondent, being duly sworn, testified as follows :

Direct Examination

By Mr. Waddoups :

Q. Will you state your name, please?

A. Calvert Graham Chipchase, C-a-l-v-e-r-t, G-r-a-h-a-m, C-h-i-p-c-h-a-s-e.

Q. Where are you employed?

A. I am employed by the Bonding and Insurance Company, Limited.

Q. And what is your business there, your position?  
A. My position is treasurer.

Q. Are you familiar with the records of that company, that is, the marine records of the company relative to the case of the "Miss Philippine"?

A. I am.

Q. The insurance records and correspondence concerning it?  
A. I am.

Q. And have those records since June of 1949 been in [114] your custody?

A. Except for the time they have been in your custody.

Q. And have you received in the course or since June 6, 1949, any written notice of abandonment, aside from the letter of June 14th, 1949, now in evidence and marked Exhibit "I"?

A. No, I have not.

Q. And do the records of your company reflect any such written notice aside from this one exhibit?

(Testimony of Calvert Graham Chipchase.)

A. To the best of my knowledge, no.

Mr. Waddoups: No further questions.

### Cross-Examination

By Mr. Greenstein:

Q. Mr. Chipchase, when was the first time that your office knew of the stranding of the vessel?

A. I believe when we read in the paper, Mr. Greenstein, was the first knowledge of it, if my memory serves me correctly. And it was a long, a long time ago. I would like to qualify that, however, to the extent that someone in our office, or perhaps myself, may have heard of it by word of mouth. I don't really know, to be perfectly honest with you.

Q. Well, let's see. I think we have a letter in evidence at this time of Mr. Matthew. Well, Mr. Matthew is your office manager? [115]

A. Mr. Matthew is my office manager.

Q. And the office did send a letter on June 9th, I take it?

A. That is correct.

Q. So you did know about the loss—right?

A. That's correct.

Q. Now, the employment of King Limited in the charter party was pursuant to instructions from your office, was it not?

A. The employment of King Limited in pursuance of the charter party was with the consent of the principal, of my, of the company's principal, yes.



(Testimony of Calvert Graham Chipchase.)

Q. Just for simplicity, it was through the authority of your office?

A. The delegated authority of my office, yes.

Q. And the decision to take the "Miss Philippine" off the reef and refloat it was pursuant to your authority?

A. That's correct, sir.

Q. In other words, your insurance company, meaning the insurance company you represent, the Respondent herein, did take control of the "Miss Philippine," did it not, when it took it off Kaupo?

A. Yes, it did.

Q. And you continued to have that control?

A. King Limited continued to have the control, the [116] active control.

Q. Well, now, let's look at the charter party. Mr. Gallagher was your agent?

A. That's correct.

Mr. Waddoups: If your Honor please, I will object to this line of questioning on the grounds that it is not properly within the scope of the direct examination. He was asked of notice of abandonment.

Mr. Greenstein: Well, it just saves time. We can excuse the witness and then call him as our witness.

The Court: Well, I was thinking that.

Mr. Waddoups: We will withdraw the objection.

The Witness: What was the question again, Mr. Greenstein?

Q. Well, I asked you to look at this charter party

(Testimony of Calvert Graham Chipchase.)

with reference to paragraph 2 in which reference is made that the control of said vessel shall pass to Mr. Gallagher. Now, Mr. Gallagher was your agent, was he not?      A. That's correct.

Q. So actually the control of the vessel on the route was your control?

A. Unfortunately, yes.

Q. Now, I take it that the insurance company did not have the vessel repaired—right?

A. That's correct. [117]

Q. When did you give up control of the vessel? Or let's put it, where, if you don't know the date?

A. The time and place that the charter money ran out, I gave up control, Mr. Greenstein.

Q. You gave up the control to King Limited?

A. That's correct.

Q. And they in turn gave up control to the party who has it in the back yard? No further questions.

The Court: Well, I heard what you said, but I am not quite sure what you mean by what you said. Now, you engaged the King company to take the vessel off the beach there, and you put a time limit or a money limit?

The Witness: Yes, by the terms of the charter party they were to be paid at the rate of \$15.00 an hour.

The Court: And that time expired when they had the vessel in tow out at sea?

The Witness: That's correct, sir.

The Court: Now, they didn't abandon the vessel

(Testimony of Calvert Graham Chipchase.)

at that time, but went ahead and go with responsibility and apparently on their own time took her into safe port and tied her up. Now, you say that when your contract with them ran out by its terms, that you abandoned the boat?

The Witness: They asked us for instructions, your Honor, and we said there are none.

The Court: So it was up to them to do whatever they [118] wanted? They could cut her loose and be responsible only to the laws and regulations under which the Coast Guard operates?

The Witness: Right, yes, sir.

The Court: All right.

### Redirect Examination

By Mr. Waddoups:

Q. Did you pay the cost of having the vessel righted at Kaunakakai?

A. We paid King Limited fifteen hundred dollars, in accordance with the charter.

Q. Who paid the cost of having her righted at Kaunakakai?      A. Oh, the insurance company.

Q. Your insurance company?

A. My insurance company.

Q. And was there a limit to your authority from your mainland office as to how much you could expend in transporting that vessel?

Mr. Greenstein: That is objected to, if the Court please.

Mr. Waddoups: No further questions.

(Testimony of Calvert Graham Chipchase.)

The Court: I think that would be an interesting thing to know in the case, if there was. Was there any limit?

The Witness: There was a limit, your Honor, if I may use my own words a little bit. King Limited approached us and asked that they be given the salvage job, that we engage [119] them. And they said they could do it for fifteen hundred dollars, as I recall. We called my company on the mainland and explained the situation to them. They said, all right, if it can be done for the fifteen hundred dollars, go ahead. And that point the charter party was drawn and signed before I personally saw it. Then there were no further limitations put on the expenditures except in the usual agent-principal relationship in the matter of good faith. We were authorized and are authorized to make reasonable expenditures.

On the advice of Mr. Gallagher that there was in his opinion, that in his opinion it was desirable to right the vessel at Kaunakakai, I felt justified in authorizing the expenditure for so doing it, yes, sir.

The Court: Well, your company did authorize Gallagher to take hold of the vessel again after you had washed your hands of her while she was at sea?

The Witness: We didn't exactly take hold of her, your Honor. We went over there and she was lying alongside. We put a sling around her and righted her. To that extent we took over.

The Court: And after that was done, why, you abandoned it?

(Testimony of Calvert Graham Chipchase.)

The Witness: We tied her up and left her, yes, sir.

The Court: All right.

Mr. Waddoups: You may step down. [120]

(Witness excused.)

Mr. Waddoups: We have no further evidence to present, your Honor.

The Court: I beg your pardon?

Mr. Waddoups: We have no further evidence to present at this time.

Mr. Greenstein: We have no further evidence, no rebuttal.

The Court: Suppose we come back at half-past one? Is that a convenient hour?

Mr. Waddoups: Yes, your Honor.

Mr. Greenstein: Yes.

The Court: For the argument in this case. The argument won't be long, will it?

Mr. Greenstein: I will waive opening argument.

Mr. Waddoups: We'd like to present an argument, your Honor.

The Court: All right. Half-past one.

(The Court recessed at 11:30 a.m.) [121]

#### Afternoon Session

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente, Libelant, versus The Indemnity Marine Assurance Company, Limited, Respondent.

The Court: Now, the Libelant waived the opening argument, so that you may proceed.

Mr. Waddoups: If your Honor please, yesterday in arguing our motion for a Non-suit, for a voluntary Non-suit, we addressed ourselves to the question of the utter and complete failure of the proof of total loss or constructive total loss, and also addressed ourselves to the failure on the part of the Libelant to carry out his duty under the contract of insurance, to sue and labor for the vessel in the interest of diminishing and preventing damages. We again renew and urge those points in connection with the case in chief. And as to other points of law that are presented Mr. Brown of our office will present argument. There are some rather nice points involved and the thought that has occurred to me, which I submit to your Honor, is that perhaps the Court would prefer to have a memorandum of authorities than mere oral argument on it. I consider them very serious points. We leave that to the Court's discretion and decision at this time.

The Court: Well, perhaps I would like to have a written memorandum, but at this time I would be glad to hear oral [122] argument, and then, if I feel that written memoranda ought to be presented, then I will ask for them.

Mr. Waddoups: Very well, your Honor.

(Argument of Counsel.) [123]

January 19, 1950

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente vs. Indemnity Marine Assurance Company, Limited, for further trial.

Mr. Greenstein: Ready for the Libelant.

Mr. Waddoups: Ready for Respondent, your Honor. Before Libelant proceeds with his argument, we have given a great deal of thought and consideration to questions of law involved in this case, your Honor. I am frank to say the question is a very nice one and we feel that we cannot do justice to it verbally and would like, therefore, before your Honor rules in this case, to file with the Court a written memorandum covering it.

The Court: Very well. Do you want to add anything to your memorandum?

Mr. Greenstein: Yes, if the Court please. As a matter of fact, the memorandum we did submit was merely at an interlocutory stage.

(Argument by Counsel.)

The Court: How much time do you wish to prepare?

Mr. Waddoups: I think a week would be sufficient, your Honor.

The Court: A week from today. That would be the 26th. And you? [123-A]

Mr. Greenstein: I should like a week after to reply to their brief.

The Court: A week after. All right. A week

from today will be the 26th and a week following will be February 2. By noon of those days.

All right.

(Thereupon, at 10:25 a.m., January 19, 1950, the hearing in the above-entitled matter was adjourned.)

March 27, 1950

The Clerk: Admiralty No. 417, Fulgencia D. Cadiente vs. Indemnity Marine Assurance Co., Limited. Case called for further hearing.

Mr. Greenstein: Ready for the Libellant.

Mr. Waddoups: Ready for the Respondent.

The Court: What is the number?

The Clerk: Admiralty 417.

The Court: Very well.

Mr. Greenstein: Shall we proceed, your Honor?

The Court: Yes.

Mr. Greenstein: Mr. Cadiente, will you resume the stand, please?

The Clerk: Has he already been sworn in the previous case?

Mr. Greenstein: He was originally. May he be reminded that his oath is still binding?



DELESFORO B. CADIENTE

recalled as a witness on behalf of the Libelant, having been previously duly sworn, was examined and testified further as follows:

The Court: You recall you have been sworn in this case and you are now testifying under oath.

The Witness: Yes, sir. [125]

Direct Examination

By Mr. Greenstein:

Q. Mr. Cadiente, for the record will you state your name again?

A. Delesforo B. Cadiente.

Mr. Waddoups: May I interrupt at this time, your Honor? I don't recall, Mr. Greenstein, whether or not you invoked the witness rule before.

Mr. Greenstein: I am glad of your intervention. I think the nature of the testimony is such that possibly one of the two agents might be excused, perhaps Mr. Matthew.

Thank you, Mr. Waddoups.

Q. (By Mr. Greenstein): And you have testified at the earlier hearing in this case, have you not?

A. Yes, sir.

Q. You are the same Mr. Cadiente who testified earlier? A. Yes, sir.

Q. Now, throughout all of the dealings in connection with this sampan and the insurance company, you have been the agent of the registered owner, your wife, have you not? A. Yes, sir.

(Testimony of Delesforo B. Cadiente.)

Q. There is no question about that?

A. Yes, sir.

Q. Would you tell us in your own words, and you can start at the very beginning, when you were apprised of the [126] loss of the "Miss Philippine," tell us what you did with reference to ascertaining the condition of the "Philippine," and with further reference to whether or not you gave any notice of abandonment to the insurance company. Just tell us the story in your own words, briefly.

A. June 6, nine o'clock in the evening—

Q. Will you speak slowly and distinctly so the Court can understand?

A. June 6, nine o'clock in the evening I was informed that "Miss Philippine" is grounded at Hana, Maui. Then in the next morning I came to Honolulu to get a ticket for me to go to Maui, but before I proceeded to Maui, Mr. Hagood, who is working at the King, Limited, come and see me and ask me if I wanted him to salvage the boat. Well, I told him, "I am not yet decided, because I have not seen the condition of the boat." So he asked me if I could pay his fare to go with me to Maui. I said "yes," so we went to Maui. When we reached Maui—

Q. When did you reach Maui, what day?

A. On the 7th.

Q. Proceed.

A. We reached Maui about 4 o'clock in the afternoon. I took a taxi to the boat—to the place

(Testimony of Delesforo B. Cadiente.)

where the boat was grounded. He took an airplane. The next morning I found out that the boat was badly damaged and the keel almost gone [127] and some of the breast of the boat gone. So I was thinking then that it was hopeless for me to salvage the boat.

Mr. Waddoups: I move to strike the last statement, your Honor, on the ground that it is not binding on the libelee as to what he was thinking at that time.

Mr. Greenstein: I will concur in that at this time, if the Court please.

The Court: That is true. It isn't binding on the libelee what he was thinking.

Q. (By Mr. Greenstein): Proceed.

A. So the next morning, Wednesday, I went back again to the boat, and I found out that the boat was getting worse and worse, so I decided then——

Q. Pardon me. In the meantime was Mr. Hagood still on Maui, or not?

A. No, he came back to Honolulu the same day.

Q. All right.

A. So I found out that the boat was getting worse, so then from that time I decided to abandon the boat.

Q. What did you do, if anything, on that morning, the 8th?

A. After I decided to abandon the boat, I went up to a telephone and call up the Coast Guard of

(Testimony of Delesforo B. Cadiente.)

Honolulu, asking them to notify Mr. Hagood, who is representing the towing of the boat, to tell him not to come to Maui any more because I [128] am abandoning the boat, thinking that Mr. Hagood will also notify the insurance.

Mr. Waddoups: I move to strike what he was thinking and object to any statement of what he was thinking. We have no objection to his telling what he did in the process of, but his own impressions, I am sure, are not of interest to this Court.

The Court: What he thought Mr. Hagood might do is not evidence.

Q. (By Mr. Greenstein): Tell us what you did.

A. Then I called up the Coast Guard, telling——

Q. This is the morning of June 8th?

A. Yes, sir.

Q. Thank you.

A. (Continuing): And telling the Coast Guard, asking the Coast Guard to notify Mr. Hagood not to come to Maui any more because I was abandoning the boat, thinking——

Q. No, don't tell us what you were thinking.

Q. Prior to this time, to your knowledge had Mr. Hagood also been in communication with the insurance company?

A. Yes, sir, because——

Q. When was that?

A. Well, that time before we went to Maui he called up the insurance.

Q. What day was that? [129]

(Testimony of Delesforo B. Cadiente.)

A. That is Tuesday, the seventh.

The Court: I didn't get the statement. "That time we went to Mauri," what happened?

(Answer read.)

Q. (By Mr. Greenstein): In other words, the day before Mr. Hagood had called up the insurance company in your presence? A. Yes, sir.

Q. After you made this 'phone call to the Coast Guard in Honolulu, what did you do?

A. I came back to Honolulu.

Q. And what did you do the following day?

A. And then the next day, Thursday the 9th, early in the morning, I went to my boat builder, explaining to him the condition of the boat, telling him that the keel almost gone and some of the breast all gone. Then after I told him the condition of the boat, he told me——

Mr. Waddoups: I will object to what he told this witness as being hearsay, your Honor.

Mr. Greenstein: Well, if your Honor please, we have a little different situation here, because if we get to the element of abandonment, we gether to whether or not the owner had a right to abandon, and we are permitted to go into such questions as to what he did to ascertain the salvagability.

Mr. Waddoups: We have no objection, your Honor, as to what this particular witness did, but we certainly [130] object to his testifying as to anything the boat builder told him. Presumably, the boat builder is available and his own testimony is the best evidence. Purely hearsay.

(Testimony of Delesforo B. Cadiente.)

Mr. Greenstein: May we have a ruling on that, your Honor?

The Court: That is correct. What the boat builder told him would best come from the boat builder.

Q. (By Mr. Greenstein): Now, you did discuss the condition of the boat with the boat builder?

A. Yes, sir, I did.

Q. And that was the man who originally built "Miss Philippine"?

A. Yes, sir.

Q. Now, as a result of that conversation, did you have a decision as to whether or not you were going to abandon the boat?

A. Yes, I was going to abandon the boat.

Q. And that was after you had a conversation with—who was the boat builder?

A. Tanimura.

Q. And this, I take it, is June 9?

A. June 9, yes, sir.

Q. Now, I show you an exhibit in evidence—

The Court: Mr. Tanimura?

Mr. Greenstein: Tanimura is the original boat [131] builder.

Q. (Continuing): Libelant's Exhibit 11, and ask you whether you have seen that letter before?

A. Yes, sir.

Q. That is the letter you received from the bonding and insurance company?

A. Yes, sir.

Q. The agent for the respondent here. When did you receive this letter?

(Testimony of Delesforo B. Cadiente.)

A. About 8 o'clock on the 9th of June, sir.

Q. About 8 o'clock.

The Court: Ninth of June?

Mr. Greenstein: Ninth of June, being a letter from the bonding and insurance agency making a demand——

The Court: Morning or evening?

The Witness: Evening.

Q. (By Mr. Greenstein): You received this in the evening of that day?      A. Evening.

Q. After you received that letter, what did you do?

A. The next day, the 10th, I come right away and go to Mr. Matthew's office.

The Court: What is the exhibit number?

Mr. Greenstein: Exhibit No. 11.

Q. (By Mr. Greenstein): Now, I take it, as a result of [132] that letter, you went to the insurance company the following morning?

A. Yes, I went.

The Court: That would be on the 10th?

The Witness: On the 10th.

Q. (By Mr. Greenstein): Now tell us what you did and who was there.

A. On the 10th of June, as soon as I received the letter, I went to see Mr. Matthews, who sent me the letter. As there were plenty people in his office, about seven of them——

The Court: So Mr. who? Marcus, you say?

Mr. Greenstein: Matthew.

(Testimony of Delesforo B. Cadiente.)

The Witness: Matthews.

Q. (By Mr. Greenstein): Do I take it you went to his office? A. Yes, I went to his office.

Q. And that is the bonding and insurance office at Fort and Merchant Street? A. Yes.

Q. What did you tell Mr. Matthew, if anything?

A. I told Mr. Matthews that I just came back from Maui to examine the boat, and I found the condition of the boat was badly damaged, that I am abandoning the boat.

Q. Did you tell Mr. Matthews that you had talked to the boat builder about the condition of the boat? [133]

A. Yes, I did, and I told Mr. Matthews that I called up the Coast Guard to notify the King Limited that I am abandoning the boat. Then he told me, "Well, you better go to the lawyer's office"; that means Mr. Waddoups' office.

Q. Just a minute, let's get this. Will you repeat that slowly?

The Court: You say you told him you had called up King, Limited, and asked them to tell the insurance company that you were abandoning the boat; is that what you said?

The Witness: No, sir, I called up the Coast Guard.

The Court: Oh, Coast Guard.

The Witness (Continuing): To notify the King, Limited.

The Court: Yes.



(Testimony of Delesforo B. Cadiente.)

The Witness (Continuing): Not to come to Maui any more because I am abandoning the boat.

The Court: Just between you and the Coast Guard and King, Limited?

The Witness: Yes.

The Court: You told King, Limited, that you were abandoning the boat, and that was when? On the 8th or 9th?

The Witness: Ninth.

Mr. Greenstein: That was on the 8th.

The Court: Yes.

Q. (By Mr. Greenstein): Now, I take it, Mr. Cadiente, [134] that on the 10th you were in the office of Mr. Matthew and told him you were abandoning the boat; is that correct? A. Yes, sir.

Q. And did you tell him that you had arrived at this decision as a result—as a result of what things?

A. Of abandoning the boat.

Q. Did you tell him why you were abandoning the boat?

A. Because after I examined the boat, look at the boat, that the keel is gone and most of the breast was gone, so I know that the boat cannot be fixed and cannot be towed to Honolulu.

Mr. Waddoups: Move to strike the last statement, "I know the boat cannot be fixed," as being a conclusion of this witness. The witness is not qualified as an expert surveyor in the matter of salvage, your Honor.

The Court: Well, I think the witness could tes-

(Testimony of Delesforo B. Cadiente.)

tify that he thought the boat couldn't be salvaged to account for his actions in saying that he abandoned it. Of course, he used the word "know," but that is not an exact word of meaning. I can only construe in my own mind the use of the word "know" to be his belief in the matter.

Mr. Greenstein: I will concur in that construction, your Honor.

Q. (By Mr. Greenstein): Now, before you decided to abandon, you had personally inspected the boat, had you not? [135] A. Yes, I did, sir.

Q. And before you had decided to abandon, you had talked to your boat builder? A. I did.

Q. And described the condition to him, had you not? A. I did before.

Q. And before you had decided to abandon, you had talked to the Coast Guard?

A. To the Coast Guard.

Q. About similar wrecks, had you not?

A. Yes.

Q. You are sure on the morning of June 10 in the office of the bonding and insurance company, the agent for the respondent here, you told Mr. Matthew that you were abandoning the boat?

A. Yes, sir, I did.

Q. There is no question about that in your mind?

A. No. I tell him.

Q. Did you have a further conversation that day with anybody connected with the insurance company? A. Yes.

(Testimony of Delesforo B. Cadiente.)

Q. What happened later?

A. Well, at that time Mr. Matthew told me to go to Mr. Waddoups' office, so I went over there. There were several men, I don't know who they were. First time. [136]

Q. So you had a further conference in the office of Mr. Waddoups, the attorney for the respondent?

A. Yes, sir.

Q. And what did you say or what did they say, if you remember, about the abandonment of the boat, if that came up?

A. They asked me if I am going to salvage the boat, so I told them after I inspected the boat, examined the boat, I told him I am abandoning the boat. Then they told me to get a lawyer to represent myself in there.

Q. And it was after that that you came to see me?

A. Yes.

The Court: That was on the 10th, was it?

Mr. Greenstein: I am sorry, your Honor.

The Court: On the tenth of June?

Mr. Greenstein: Tenth, your Honor; the same morning you went in to see Mr. Matthew?

The Witness: Yes, same morning.

Mr. Greenstein: You may examine him.

### Cross-Examination

By Mr. Waddoups:

Q. Mr. Cadiente, are you sure that the date that you had the conference in my office was the same

(Testimony of Delesforo B. Cadiente.)

date that you gave Mr. Matthew verbal notice of abandonment?      A. Yes, sir, I did.

Q. You are sure of that fact? [137]      A. Yes.

Q. And I think your testimony also is that you told Mr. Hagood that you were abandoning the boat before you talked to Mr. Tanimura.

A. No, sir, I called up Mr. Hagood and then I come over here the next morning before I went to see Tanimura.

Q. Didn't you call the Coast Guard while you were on Maui before you saw Tanimura and tell them to tell Hagood to cease the salvage operation?

A. Yes, I did. That is the 7th and 8th and then the 9th I come over here.

Q. So that the notice that you gave to Mr. Hagood about ceasing salvage operations was given prior to the time you saw Tanimura?

A. No, before I saw Tanimura.

Q. That is what I mean, before you saw Tanimura.      A. Yes.

Q. And you had, at the time you gave Hagood that information, decided to abandon; is that correct?

A. First time I told Mr. Hagood that I am abandoning the boat I was at Maui. Then I come back. I went in and see Tanimura, and then from Tanimura I went again to King, Limited, offices and see Mr. Hagood. I told him I am abandoning the boat, so I notify Mr. Hagood two times.

Q. Once before you saw Tanimura and once after; is [138] that correct?

(Testimony of Delesforo B. Cadiente.)

A. No, I only see once Tanimura.

Q. No. You notified Mr. Hagood through the Coast Guard once.

A. Yes.

Q. Before you saw Tanimura.

A. Yes, sir.

Q. And then again you saw Hagood after you saw Tanimura.

A. Tanimura.

Q. Is that correct?

A. Yes, sir.

The Court: That would be on the 8th and the 9th; is that correct?

Mr. Waddoups: Yes, your Honor, that is the way I understand his testimony.

Q. (By Mr. Waddoups): Had you read this insurance policy over before you made an abandonment?

A. No, sir.

Q. You didn't know the contents of that policy?

A. No.

Q. The Company had told you that under the policy it was your duty to salvage, hadn't it?

A. No insurance company tell me about it.

Q. Didn't they make demand upon you, as reflected by Libelant's Exhibit 11, that letter that was just showed you, [139] to effect salvage?

A. Yes, they did. They tell me to proceed salvaging after I examine the boat.

Q. And you weren't aware of any of the provisions of this insurance policy at the time this thing happened; is that correct? You didn't know what was in the policy?

A. No.

Q. You had had a policy before calling for 8 per cent premium, had you not? Before this policy?

(Testimony of Delesforo B. Cadiente.)

A. No, I never get chance to read the policy because the policy was kept by the Bank of Hawaii.

Q. Isn't it a fact, Mr. Cadiente, that you took this policy out, and by "this policy" I refer to Libelant's Exhibit D, in order to enable you to get a loan at the bank; isn't that right?

A. No, I never got no chance to read that.

Q. Answer my question.

Mr. Waddoups: Will you read it to him, please?

(Question read.)

A. No, I never get no chance to hold that policy.

Q. No, you misunderstand my question. The reason why you took out this policy was so you could borrow some money on your boat at the bank; isn't that correct? A. Yes, I did.

Q. And before this policy was taken out, you had had [140] a policy which called for an 8 per cent premium; is that correct?

A. Of the insurance.

Q. Yes, the policy before the one that is in issue here. Isn't that correct, Cadiente?

A. I never started a policy myself.

Q. Wasn't your premium on the old policy a lot more than the premium on this policy?

A. I don't know.

Q. Well, you have been your wife's agent all this time, haven't you, Cadiente?

A. Yes, but I never got no chance to start a policy.

(Testimony of Delesforo B. Cadiente.)

Q. You paid out the money for your wife, didn't you?      A. Yes.

Q. And isn't it a fact that this is a 3 per cent policy that you took out to get a loan and before this you had had an 8 per cent policy that cost almost three times as much as the premium on this policy?

A. You mean when I borrowed the money from the bank?

Q. No. Before you took out the policy you had one other policy; is that correct?      A. Yes.

The Court: Same boat?

Mr. Waddoups: Beg pardon?

The Court: Same boat? [141]

Q. (By Mr. Waddoups): On the same boat?

A. Same boat.

Q. And that policy had a premium much higher than the policy called for in this one; isn't that correct?      A. Yes, sir.

Q. And the other policy was one that covered averages and other losses; isn't that correct? Besides constructive total loss?

A. Oh I don't know.

Mr. Waddoups: That is all.

### Redirect Examination

By Mr. Greenstein:

Q. Mr. Cadiente, where were you born?

A. In the Philippines, sir.

Q. How old are you?      A. Forty-six.

(Testimony of Delesforo B. Cadiente.)

Q. You are a citizen of the United States, I take it?      A. Yes, sir.

Q. By virtue of naturalization?      A. Yes, sir.

Q. How much schooling have you had?

A. High school.

Q. Is that in the Philippines?

A. Yes, eighth grade in the Philippines.

Q. I show you Libelant's Exhibit D, which is the [142] insurance policy in this case upon which we are suing, and I ask you whether or not anybody from the bonding and insurance company has ever explained this policy to you prior to the loss.

A. Nobody.

Mr. Greenstein: You may examine.

#### Recross-Examination

By Mr. Waddoups:

Q. What schooling has your wife had?

A. What is that?

Q. What schooling has your wife had?

A. Same.

Q. Were you present when this policy was taken out?      A. Yes.

Q. Did anybody explain to your wife the contents of this policy?      A. No, sir, nobody.

Q. You didn't know what this policy said when you took it out?

A. No, because there was an agent that come to our house representing the bonding and insurance company, Mr. William Cruz, and he told me to buy



(Testimony of Delesforo B. Cadiente.)

an insurance of the boat, and so because we are interested to have the boat insured, we said "yes."

Q. Why did you change from the other type of policy to [143] this policy?

Mr. Greenstein: That is objected to, if the Court please. We are suing on this policy, not another policy.

Mr. Waddoups: Presumably you are inferring he doesn't know anything about insurance policies. Presumably, that would go to the question of whether or not he did.

Mr. Greenstein: I will withdraw the objection.

The Court: Will you read the question back?

(Question read.)

The Witness: Do you want me to answer that?

Q. (By Mr. Waddoups): You have testified before you signed the policy with the Indemnity Marine Assurance Company, which is in evidence as Libelant's Exhibit D, and which I hand you, that there had been another insurance policy which called for an 8 per cent premium, or a premium very much higher than this one; is that right?

A. Yes.

Q. Now, why did you change from that other type of policy to this policy?

A. Because when the expiration of the insurance—

The Court : What?

A. (Continuing): Because when the first insurance was expired, the agents of the insurance they

(Testimony of Delesforo B. Cadiente.)

never come and see us any more. So I don't know how this man learned that the insurance of my boat was expired, that he came over and see [144] us and he want us to insure the boat through the bonding insurance.

Q. What was the name of that man?

A. William Cruz.

Q. (Spelling): C-r-u-z? A. Yes.

Q. Did you sign that at your home or in the bonding and insurance company's office—or did your wife sign it, rather?

A. At the house; in the house.

Q. At your home? A. Yes, at the home.

Mr. Waddoups: I think that is all.

### Redirect Examination

By Mr. Greenstein:

Q. Now, Mr. Cadiente, when Mr. Waddoups asked you, Did you sign that?—you haven't signed an insurance policy, have you? Your signature isn't on the policy, is it?

A. No. He asked me if I signed it and I said "no," and then he asked me about my wife.

Q. A little slower. You haven't signed anything on an insurance policy? A. No.

Q. Now, as a matter of fact, the bonding and insurance company didn't give you a sample of a policy and show it to [145] you before you took out the insurance? A. No, sir.

Q. As a matter of fact, this is no different from

(Testimony of Delesforo B. Cadiente.)

any other insurance situation, you bought an insurance policy without ever seeing the contract; isn't that correct?

Mr. Waddoups: Objected to——

A. That is right.

Mr. Waddoups (Continuing): ——as leading, your Honor.

The Witness: That's right.

Mr. Waddoups: This is still his witness.

The Court: It is leading.

Q. (By Mr. Greenstein): Did they show you this particular contract of insurance before you indicated your willingness to buy it?

A. No, sir, I never seen it.

Mr. Waddoups: Do I understand Counsel to intimate that there is no contract here, that there is no meeting of the minds?

Mr. Greenstein: No, I am not saying that. I am simply saying this insurance policy is the same as every other policy in the Territory out here. I don't know of anybody who gets to look at a contract of insurance before they buy it. That is notorious. It is common sense.

Q. (By Mr. Greenstein): So that your testimony is you were not shown this policy before you bought it? [146]           A. No, sir.

Q. Right or wrong?

A. Right. I never seen it.

Q. At no time has anybody ever explained this policy to you?           A. No, sr, nobody.

Mr. Greenstein: That is all.

Mr. Waddoups: No further questions.

Mr. Greenstein: Will you resume your seat, Mr. Cadiente?

(Witness excused.)

Mr. Greenstein: Would you call Mr. McAndrews? This witness has already testified, your Honor.

### JAMES T. McANDREWS

called as a witness on behalf of the Libelant, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Greenstein:

Q. Mr. McAndrews——

The Court: What is the name?

Q. (By Mr. Greenstein): State your name, please.

A. James T. McAndrews.

Q. And you previously testified in this case?

A. That's right. [147]

Q. Will you——

Mr. Greenstein: May the Court advise him that the oath is still binding?

The Court: You understand that——

The Witness: Yes.

The Court (Continuing): ——you have been

(Testimony of James T. McAndrews.)

sworn in this particular case and you are now testifying under oath.

Q. (By Mr. Greenstein): I again show you Libelant's Exhibit B to refresh your memory. Would you examine the date and when you finish examining it, indicate to me?

A. You want me to indicate what?

Q. You have finished examining it? A. Yes.

Q. This is a charter party which purports to have been signed on the 11th day of June, 1949?

A. Yes.

Q. That is correct? A. Yes.

Q. Now, prior to the signing of this charter party, I ask you whether or not you attended a meeting in Mr. Waddoups' office at which time Mr. Cadiente was also present?

A. Prior to the signing?

Q. Yes. A. No.

Q. Well, at the time of the signing, the same day, [148] was Mr. Cadiente also present?

A. No.

Q. Have you ever seen Mr. Cadiente before?

A. Yes.

Q. At a meeting with any of the other parties?

A. Yes, I saw him in Mr. Waddoups' office, but it was after the signing of the charter party.

Q. It was after the signing of the charter party. Let me ask you this: As representative of King, Limited, you had dealings with the insurance company in connection with the arranging for this charter party? A. That's correct.

(Testimony of James T. McAndrews.)

Q. And I put it to you directly: Were you advised by a representative of the insurance company that in point of fact Mr. Cadiente had abandoned the boat?

Mr. Waddoups: Objected to as leading.

The Court: It is leading in its frame.

Mr. Greenstein: I will withdraw it.

Q. (By Mr. Greenstein): Prior to the signing of the charter party, Mr. McAndrews did you have any conversation with representatives of the insurance company in this case as to whether or not there had been an abandonment by the owner?

A. Well I had conversations with the insurance company's representative, but I do not recall that there was any [149] mention of abandonment. No, I don't recall that there was any mention.

Q. Now you are sure about that?

A. Well, it was so long ago that it is hard to be sure about it, but to the best of my memory I don't recall any such statement having been made by the representative of the insurance company.

Q. Well, was there any understanding as to whether there had already been an abandonment?

Mr. Waddoups: Objected to as being an improper question. This witness can't testify as to what other people understood. Calling for a conclusion of the witness.

The Court: Let's have the question again.

(Question read.)

(Testimony of James T. McAndrews.)

The Court: Any understanding with whom? On the part of the witness, or what?

Mr. Greenstein: On the part of the witness as to the understanding of the insurance company.

The Court: Well, I don't know that he is competent to answer that.

Q. (By Mr. Greenstein): Now, as a result of your entry into this charter party with the insurance company, the "Maizie C," your boat, proceeded in accordance with the terms. Now Mr. McAndrews, did you stay in communication with the "Maizie C" during the salvage operations? [150]

A. Yes, I was in communication with the boat by radio 'phone.

Q. And would you just describe that in a little more detail? Where was your receiver?

Mr. Waddoups: If your Honor please, I think we have gone into the operations of the "Maizie C." It was my understanding the Court was interested in this hearing on the question of the time and manner of abandonment and notice to the insurance company, if in fact there was a time and manner and notice.

Mr. Greenstein: I concur somewhat in the remarks of Counsel, and I appreciate this was called for a limited purpose. I do beg leave to ask one question which may or may not tie it up and have some probative value.

Q. (By Mr. Greenstein): You are familiar with the course that the "Maizie C" took in connection with the towing of the "Miss Philippine"?

(Testimony of James T. McAndrews.)

A. Yes.

Q. And you were in communication with both the "Maizie C" and the insurance company?

A. That is correct.

Q. Did you get in touch with the insurance company about the \$1500 had been used up, which is referred to in your charter party? A. Yes, sir.

Q. And what were you instructed by the insurance [151] company?

A. When it was used up, we asked for further instructions in accordance with the terms of the charter party.

Q. And what were your further instructions?

A. And we were advised that there were no further instructions.

Q. So that the ultimate tying up of the "Miss Philippine" was not in pursuance to instructions issuing from the insurance company?

A. That's correct.

Mr. Greenstein: No further questions.

#### Cross-Examination

By Mr. Waddoups:

Q. Mr. McAndrews, you have testified that you were present in my office at a time when we held a meeting there. A. Yes, sir.

Q. Do you recall whether Mr. Cadiente was present at that meeting?

A. He was in the office yes.

Q. He was there with us?



(Testimony of James T. McAndrews.)

A. Yes, he was there.

Q. And do you recall that I told him that so far as the Company was concerned, we still looked to him to salvage that vessel?

A. I remember that very distinctly. [152]

Q. And do you also recall my telling him that the matter had taken on such serious proportions that I felt that in fairness to him he should go seek counsel of his own?

A. I remember that very distinctly.

Q. And have the benefit of the advise of counsel before anything further was done? A. Right.

Q. Do you also recall that the meeting that was held in the office was after the charter party, Libellant's Exhibit B, had been executed?

A. Absolutely.

Q. And it was about two days after, was it not?

A. Yes.

Q. Calling your attention to the fact that this is dated June 11—by "this" I refer to the charter party—would the 13th of June be, in your recollection, a likely date upon which that meeting was had?

A. Well, I would have to check the calendar, but I remember the day the charter party was signed was a Saturday, and it was the following week that we had the meeting.

Q. So that it would have had to have been the 13th at the earliest because you didn't meet on Sunday; is that correct? A. That is correct.

(Testimony of James T. McAndrews.)

Q. And where was the "Miss Philippine" when this [153] meeting was being held?

A. Well, according to the skipper of the "Maizie C," he was off Mala Wharf.

Q. He already had her under tow; is that correct?

A. When our meeting was held, the boat was under tow, yes.

Mr. Waddoups: No further questions.

Mr. Greenstein: No further questions.

The Court: Just a minute.

Mr. Waddoups: Just a minute, Mr. McAndrews.

The Court: When you say the provisions of the charter party were worked out, or exhausted, something to that effect, what do you mean?

The Witness: Well, sir, the charter party, which is an exhibit was entered into on the basis of an amount of money per hour. In other words it was a "no cure no pay" charter party, nor was it a guarantee to bring the boat into any specific port for that specific amount of money, but it said when the amount of money agreed upon, which I believe was \$1500, from memory, was exhausted, under the terms of the charter party that we would ask the insurance company whether they wanted us to carry on with the salvage of the vessel or whether they didn't want us to carry on; in other words, did they want to spend any more money. So when that happened, when we had run out of the \$1500, we asked [154] the insurance company's representatives, and at

(Testimony of James T. McAndrews.)

that time Mr. Waddoups was speaking for the insurance company, and we put it to him and he said, "No, we have no further instructions."

The Court: You talked to Mr Waddoups?

The Witness: Yes, sir, because that was in his office and he is counsel for the insurance company.

The Court: All right. And it was known then to all parties where the "Maizie C" with the tow was positioned then?

The Witness: I believe I made that plain. I couldn't swear to that, that I told them exactly where it was. I told them it was on the high seas, though, in tow, I believe.

The Court: And they declined to give you any further orders or authority?

The Witness: That's correct, sir.

The Court: So whatever was done after that was at the instance and direction of someone else other than the——

The Witness (Interrupting): Insurance company.

The Court: Insurance company.

The Witness: That's right.

The Court: Did you have any communication with the owner of the boat, or the owner's agent, anyone representing the owner at that time?

The Witness: You mean the owner of the boat that was being towed? [155]

The Court: Yes.

The Witness: No, I don't think I saw Mr. Cadi-

(Testimony of James T. McAndrews.)

ente again after he left Mr. Waddoups' office, and then later on Mr. Greenstein came in, but he only came to collect some data, and as I recall, he didn't ask any questions or anything. I didn't have any communication with him at the time.

The Court: Do I understand that Mr. Cadiente was in Mr. Waddoups' office with you——

The Witness: Yes, sir.

The Court (Continuing): ——at the time that you notified the insurance company that their funds had run out on the towing, or salvaging, operations which had been undertaken by the "Maizie C"?

The Witness: I believe so, sir, that he was there at that time. I couldn't swear to it.

The Court: Do you say you saw him there once. Was that the time?

The Witness: It was the same day, see, sir, and there were two different meetings, as I recall.

The Court: On the same day?

The Witness: On the same day. As I say, it has been quite a while ago, and I can't put my finger right on the exact times.

The Court: Well, at the first meeting at Waddoups' office, do you recall whether it was in the morning or in the [156] afternoon?

The Witness: That I think was in the morning. It was before noon.

The Court: Do you recall what the purpose of that meeting was, how you came to be called there, or how you came to be there, for what reason or purpose you went there?

(Testimony of James T. McAndrews.)

The Witness: Well, yes, sir, I had gone over to the office of the insurance company to report to them the progress of the salvage operation, and, as I recall, at that time I was advised that the meeting would be moved to the office of Mr. Waddoups.

The Court: Yes.

The Witness: So that is where I appeared, at the office of Mr. Waddoups.

The Court: And do you recall that Mr. Cadiente was there at that meeting?

The Witness: I am practically positive that that was the time Mr. Cadiente was there, yes.

The Court: Well, did he go with you?

The Witness: No, he didn't.

The Court: Was he there when you got there?

The Witness: I think he came in after I got there. Both he and Mrs. Cadiente were there.

The Court: Well, then, you say you think there were two meetings on that day? [157]

The Witness: That is my recollection, sir. We left the office and then we came back again.

The Court: You left the office and went elsewhere and then you went back?

The Witness: Back to Mr. Waddoups' office.

The Court: Do you remember for what purpose you went back? Were you called there, or something in your own behalf?

The Witness: I think that in the morning meeting that we had made an appointment to meet again in the afternoon. That is my recollection of the reason I went back.

(Testimony of James T. McAndrews.)

The Court: All parties there had an understanding to meet again in the afternoon?

The Witness: I think so, sir.

The Court: Were Cadiente and his wife, you say, there in the afternoon?

The Witness: I don't remember that they were, sir.

The Court: Well, what were the net transactions of the meeting in the morning and the afternoon?

The Witness: Well, as I recall, first of all in the morning meeting the charter party was inspected by counsel for the insurance company and found to be in order, and then Mr. Cadiente was there, yes, I remember that time, and that was the time Mr. Waddoups said the matter was of such moment that he should avail himself of counsel, and so I presume then [158] that he went out and retained Mr. Greenstein to act for him.

The Court: Was Mr. Greenstein at the afternoon meeting?

The Witness: Yes, he came in in the afternoon. He was there. I remember very distinctly that he was.

The Court: He and Cadiente and his wife were there in the afternoon?

The Witness: No, I don't think that Mr. Cadiente or his wife were there. I think it was just Mr. Greenstein who was there. I am not positive of that, but it seems, to my recollection.

The Court: Was that at this morning's meeting

(Testimony of James T. McAndrews.)

that you got your final, definite instruction, in effect, to proceed no further under any authority of the charter party or of the insurance company?

The Witness: No, I think that was in the afternoon meeting, because I believe that after the meeting in the morning that I was able to get in touch with the boat by radio 'phone and establish its position, and I think that I then reported that at the afternoon meeting. That is my recollection.

The Court: And then you were informed that the insurance company had no further instructions?

The Witness: Yes, sir, that is my recollection.

The Court: And then did you convey that to the master of the "Maizie C"?

The Witness: Yes, I think—yes, I did. I conveyed that to the master of the "Maizie C."

The Court: About what time of the day was that?

The Witness: About three or four, I guess. Probably could get that time exactly from the log of the "Maizie C," though.

The Court: Yes, I suppose. All right. Are there any questions?

Mr. Greenstein: I don't believe it is important, your Honor, but since it has come out, perhaps it will just clear the record with reference to the afternoon meeting. Yes, I came in in the afternoon at the meeting, do you recall?

The Witness: That is what I recollect.

The Court: That was on what date of the month?

Mr. Greenstein: I don't recall the date. Shall we stipulate on that?

(Testimony of James T. McAndrews.)

Mr. Waddoups: I will clarify that for the Court. I am prepared to clarify this date from certain records of our office.

Mr. Greenstein: I will stipulate as to date, if you have it here.

Mr. Waddoups: I might state, your Honor—I understand Counsel will stipulate—I might state that under our system of keeping time at the office, each lawyer in the [160] firm is furnished with what is known as a daily time sheet upon which notations are made either concurrently with doing time or at the end of the day of what work has been done for what particular clients. Those sheets are referred to a girl in the bookkeeper's office, who types them onto master sheets under the name of the client. I had not examined this prior to the hearing before, and it was in an effort the other day, with members of the insurance company, to peg the exact date of this conference that it occurred to me that I might go to our time record and see what was reflected there. And I show Counsel the notation which appears on the typewritten sheet. On that date there appears the following: "June 13." After that, "W," meaning Waddoups. "Conference with Chipchase, Gallagher, Cadiente, et al."

The Court: What day? What time of day?

Mr. Waddoups: That was in the morning, your Honor. The time of day doesn't appear here, but my recollection is that that was in the morning.

Mr. Greenstein: That was before I was in the case.



(Testimony of James T. McAndrews.)

Mr. Waddoups: In the forenoon.

The Court: Conference with whom?

Mr. Waddoups: Chipchase, Gallagher, Cadiente, et al. I might for the record state, and Counsel will take my word for it, there was also in attendance the witness Mr. McAndrews; and Mr. Chipchase, his name appears. And a Mr. [161] Miller, who is also associated with the American Bureau of Shipping. And Gallagher's name already appears here. And during that early morning meeting—I will gladly take the oath and clear this thing up for the Court.

Mr. Greenstein: I will accept your representation.

Mr. Waddoups: I think things will be more orderly if I do. Would the Court prefer that?

Mr. Greenstein: Can we finish this in order? We are worried about the date.

Mr. Waddoups: The date was June 13. There was one meeting in the morning and another in the afternoon. My notation shows: Conference with Chipchase, Gallagher, Cadiente, et al. Conference with Greenstein and two 'phone calls (He says Cadiente—

Mr. Greenstein: I object to that at this time.

Mr. Waddoups: All right.

Q. (By Mr. Greenstein): So that in the afternoon I came in and represented myself as representing the Cadientes?

A. As I recall, that is what occurred.

Q. And I believe I stated to the group that I

(Testimony of James T. McAndrews.)

had been in the case only a few minutes and knew nothing about the factual matter. Is that a fair representation?

A. I recall something like that.

Q. And I think I wanted some notes on the policy. I didn't have a copy of the policy with me and I wanted some [162] notes on, I think the charter party, or the charter party was tendered to me for inspection, and I made some notes and left without committing myself one way or the other. That is a fair representation, is it not, Mr. McAndrews?

A. Yes.

The Court: I think that is all. Are you through?

Mr. Greenstein: I am through with this witness unless Mr. Waddoups has some questions.

Mr. Waddoups: No questions.

(Witness excused.)

Mr. Greenstein: I have nothing further to present on the point of the issue.

Mr. Waddoups: May I have the Court's indulgence. Having shown Counsel the notation, your Honor, that appears on the records of our office, after the notation relative to the conference that has just been told the Court, there appears in our records a statement: "Conference with Greenstein and two 'phone calls." Then in brackets "He says Cadiente has abandoned sampan." I want the record to be clear that in that statement to me he made no statement as to when that abandonment had oc-

curred, but Mr. Greenstein, as I recall it from my recollection, did state that the sampan had been abandoned by his client, and that was in the late afternoon of June 13, 1949.

Mr. Greenstein: May I say, since we are going a little beyond the usual scope of examination and have gotten [163] into the inter-office matters, that I don't know the exact time, but just a few minutes elapsed before I had first met Mr. Cadiente who advised me he thought he needed a lawyer and would I please go to Mr. Waddoups' office, that when I did go up there I had no information as to what the matter was about, specifically, no information as to whether or not there had been an abandonment. At that time I had not seen a copy of the insurance policy. I believe that I asked Mr. Waddoups if he had a copy, and I think there was one which I inspected; and you mentioned, Mr. Waddoups, there was a charter party, and you let me examine it, and I advised you I would go back, Mr. Cadiente was coming back to my office. I think I did call you, as it reflected in your log, except I think I might have said he had already abandoned it, instead of the word "has."

There is, of course, in the record my letter of June 14, which I submit is a demand for payment under the policy rather than an attempt at a formal abandonment. The last paragraph of that letter may be important.

"You are again notified" that such loss occurred on such and such a date "and that said vessel has

been abandoned by the assured," referring in my mind to the previous, if any, abandonment by the owner.

I think we have nothing further on this, your Honor.

The Court: All right. [164]

Mr. Waddoups: We have nothing further to offer, your Honor. I think it is amply clear that the date on which Mr. Cadiente came in to see Mr. Matthew of the bonding and insurance agency and the date where he says that he told Mr. Matthew that there had been an abandonment has been set at the 13th, because Mr. Cadiente said that it was the same day that he went up to a meeting at our office, and not the 10th, as he has testified, as is further brought out by the fact that Mr. Andrews testified that the meeting was after the execution of the charter party, which was executed on Saturday, and the meeting was held the following week, so the earliest date would have been the 13th, the charter party being dated the 11th.

Would the Court like to hear from Mr. Matthew? He is out in the hall. We would like to clear this matter up and get the whole picture before the Court.

The Court: McAndrews testified—at least to the effect, as I got it—that on the day he was in Mr. Waddoups' office at this conference, it was on that day that he was definitely told that the charterer's insurance company had no further directions to give, and on the afternoon of that day, about three or

four o'clock, he communicated with the master of the "Maizie C" which had the "Miss Philippine" in tow at sea somewhere. That is my understanding that he fixed the time when he notified the "Maizie C" that the charter party was all completed, no further directions or instructions.

Mr. Waddoups: That is correct, your Honor. He also testified that it was made amply plain in our conference with Cadiente that the insurance company was looking to him to complete salvage, and Cadiente was advised, and he was present at the conference at which these things developed.

The Court: That is the fact, then?

Mr. Waddoups: Yes, your Honor. We admit that.

The Court: On the 13th that the boat was out at sea?

Mr. Waddoups: Yes, your Honor, that is correct.

The Court: Well, of course you may call Mr. Matthew if you want to, but it was only that matter of the date I was interested in. I thought that the operations and the towing were earlier than the 13th, and the operations began a day, or was it two days before that?

Mr. Waddoups: I think the record will show that the charter party was entered into on the 11th. That required the time for the boat to go over.

The Court: Yes.

Mr. Waddoups: And I think the Court will recall that the log showed that they took her in tow on the 12th.

The Court: I am glad to have the additional testimony as to particulars, for whatever it may be worth. I don't know at this time what the outcome of the case will be in this court. I am not able at this time to say. I want to go over the record again with a little better understanding of just what transpired than I had as a result of the earlier hearing.

All right.

(Thereupon, at 11:10 a. m., March 27, 1950, an adjournment was taken in the above-entitled matter.)

#### CERTIFICATE

We, the official court reporters of the U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings held in Admiralty No. 417, Fulgencia D. Cadiente, Libellant, versus The Indemnity Marine Assurance Company, Ltd., Respondent, held in the above-named court on January 16, 17, 18 and 19, and March 27, 1950, before the Hon. Delbert E. Metzger, Judge.

May 5, 1950.

/s/ ALBERT GRAIN,

/s/ LUCILLE HALLAM.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Hawaii.—ss :

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings, transcript of proceedings, and exhibits:

Libel in Personam, Exhibit "A", Monition.

Answer.

Findings as Gleaned and Construed from Evidence.

Final Decree.

Bill of Costs.

Petition for Appeal and Order Allowing Appeal.

Bond on Appeal.

Citation on Appeal.

Assignments of Errors.

Appellant's Designation of Apostles on Appeal and Praeipie therefor.

Transcript of Proceedings—January 16, 17, 18, 19, and March 27, 1950.

Libelant's Exhibits "A," "B," "C," "D," "E," "F," "G," "H-1" to "H-5," inclusive, "I," "J," "K," and "L."

Respondent's Exhibits Nos. 1, 2, and 3.

I further certify that included in said record on appeal is a copy of the court minutes of January 16, 17, 18, 19, March 8 and 27, 1950.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of June, 1950.

[Seal]      /s/ WM. F. THOMPSON JR.,  
Clerk.

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[Endorsed]: No. 12574. United States Court of Appeals for the ninth circuit.

The Indemnity Marine Assurance Company, Ltd.,  
Appellant, vs. Fulgencia D. Cadiente, Appellee.  
Apostles on Appeal. Appeal from the United States  
District Court for the District of Hawaii.

Filed June 12, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.



In the United States Court of Appeals  
For the Ninth Circuit

No. 12574

FULGENCIA D. CADIENTE,

Appellee,

vs.

THE INDEMNITY MARINE ASSURANCE  
COMPANY, LIMITED,

Appellant.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY ON APPEAL

Comes now appellant, The Indemnity Marine Assurance Company, Limited, by Robertson, Castle & Anthony, its proctors, and in conformity with Rule 19 (6) of this Honorable Court hereby states that it intends to rely upon the following points:

I.

The insured sampan "Miss Philippine" was not a constructive total loss within the scope of the insurance policy sued upon when the appellee tendered her abandonment.

II.

Failure of the appellee to perform her duty to act for the defense, safeguard and recovery of the insured vessel bars her recovery upon the insurance policy.

## III.

Acts of the appellant in recovering, saving and preserving the insured vessel did not constitute acceptance of her abandonment nor waive any defect in that abandonment by the appellee.

Dated: Honolulu, Hawaii, June 8th, 1950.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ THOMAS M. WADDOUPS,  
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE RECORD TO BE  
PRINTED

Comes now appellant, The Indemnity Marine Assurance Company, Limited, by Robertson, Castle & Anthony, its proctors, and in conformity with Rule 19 (6) of this Honorable Court hereby designates the following portions of the record to be printed:

1. Libel in personam, Exhibit "A" annexed thereto, and monition filed July 6, 1949;
2. Answer filed November 3, 1949;

3. Findings, conclusions and opinion filed April 19, 1950;
4. Final decree filed April 25, 1950;
5. Bill of costs filed April 25, 1950;
6. Petition for appeal and order allowing appeal filed May 5, 1950;
7. Bond on appeal filed May 5, 1950;
8. Citation on appeal;
9. Assignments of error proposed by Appellant;
10. Transcript of proceedings on trial;
11. Libellant's Exhibits "B," "I," "J," and "L";
12. Appellant's designation of apostles on appeal and praecipe therefor;
13. Certificate of Clerk.

Dated: Honolulu, Hawaii, June 8th, 1950.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ THOMAS M. WADDOUPS,  
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

